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No. 123.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

FEDERAL POWER COMMISSION,
Petitioner,

v.

UNION ELECTRIC COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF

For Respondent, Union Electric Company.

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BRIEF

For Respondent, Union Electric Company.

STATUTE INVOLVED.

Paragraphs (8), (11) and (12) of Section 3 of the Federal Power Act, defining "navigable waters", "project" and "project works" (49 Stat. 838, 16 U. S. C. 796), and paragraph (d) of Section 4 of the Act, requiring annual reports by the Federal Power Commission (49 Stat. 839, 16 U. S. C. 797), as well as a summary of the statutory provisions as to *conditions incorporated in licenses*, are set out in Appendix A to this brief. Those provisions of the Act are pertinent here in addition to the provisions set out in the brief for the Federal Power Commission and in Appendix A to that brief.

QUESTIONS PRESENTED.

We disagree with the statement, at page 2 of the brief for the Commission, of the first of the two questions there set out. In view of the provisions of the governing statute the question presented, as we see it, is this.

> Whether the proposed "construction" of a dam and other physical structures, in and adjacent to a nonnavigable tributary of a navigable stream, constituting parts of a pumped-storage hydroelectric project, will affect the "interests of interstate or foreign commerce", within the meaning of Section 23 (b) of the Federal Power Act, solely because the project will be connected by a transmission line with a system serving parts of several States, and some of the project energy will be transmitted in interstate commerce.

The second of the two questions set out in the brief for the Commission (at p. 2) relating to effect upon navigability of the Black River, is one we regard as not properly before the Court in this proceeding.[1]

---

[1] The attempt to present that question—in view of the basis upon which the writ of certiorari was sought and obtained—seems to us to be in violation of Court Rule 40(1)(d)(2). We deal with that matter more specifically under Point II (A) of Argument. But in view of the possibility that the Court may decide to consider the question, we are summarizing, in the Statement of this brief, the essential evidence upon which decision of the question must depend.

STATEMENT.

We are unable to accept the Statement of the Case in the brief for the Commission as either complete or entirely accurate.

With respect to the facts pertaining to the first of the two questions presented, the inaccuracies in the Statement might be pointed out and corrected without extensive restatement. But with respect to the facts which are determinative of the second of the questions which counsel for petitioner seek to have the Court decide, their statement is not merely erroneous in important particulars but is inadequate in scope. It does not mention the most important of the facts upon which the court below based its decision with respect to the alleged effect upon navigability. Indeed it fails to relate accurately what the court actually decided upon that phase of the case.

What the court decided was that the Commission's finding to the effect that operation of the project would affect the navigability of the Black River was not supported by substantial evidence—holding that the Commission's conclusion rested upon unpermissible speculation and ignored substantial evidence to the contrary (R. 287-288; 326 F. 2d 535 at pp. 547-548).

The premises of that ruling by the court involved consideration of (1) the kind of navigation possible on the Black River (R. 270; 326 F. 2d at p. 538), (2) the possible effect of project operation (upon water level and rate of flow in the Black River) under extreme and abnormal conditions (R. 286-288; 326 F. 2d at pp. 546-548), (3) the frequent and greater changes in water level and rate of flow under natural conditions (R. 286, 287-288; 326 F. 2d at pp. 546-548) and (4) an opinion obtained by the Commission from the Corps of Engineers (but not mentioned in its report and findings) as to whether

or not construction and operation of the project would affect navigation on the Black River (R. 288; 326 F. 2d at p. 548).

So it is necessary—if petitioner's second question is to be considered and decided here—to review the evidence relating to the above-stated premises of the ruling made by the court below. In the following account of that evidence we have tried to avoid mere restatement of what appears in the brief for the Commission, but have found some overlapping unavoidable—in view of the necessity of preserving the connection between one factor and another.

Evidence Before the Commission.

The material evidence is in the Stipulation of Facts upon which the case was submitted (R. 64, 51-52, 103, Item L) and in forty-three exhibits, referred to and incorporated in that stipulation, which were separately identified and received in evidence as Exhibits 1 through 15, including those designated both by a numeral and a letter—as 2A, 2B, etc. (R. 100-104).

The Stipulation of Facts deals with matters classified under subject headings numbered I to VIII, inclusive (R. 65-79). Insofar as practicable we shall follow the same classification in the following summary.[2]

I. General Statements and Location (R. 65).

In the first division of the Stipulation the exhibits incorporated in it are listed in sixteen numbered para-

[2] As stated in the brief for the Commission (p. 4, fn. 2), construction of the project has been completed. That was done under the understanding hereinafter referred to (at p. 19, caption: *Tentative Application for License*). But the issues and evidence before the Commission related to the "proposed" construction; and we discuss the issues here from that viewpoint, as do counsel for petitioner.

graphs; and it is agreed (1) that the factual record shall consist of the Stipulation and Exhibits thus incorporated in it, (2) that factual statements (though not conclusions) in the exhibits which are not inconsistent with statements in the Stipulation shall be taken as complete and accurate, and (3) that in case of any inconsistency between factual statements in the exhibits and statements in the Stipulation, the latter shall prevail (R. 65-67).

Among the exhibits thus incorporated in the Stipulation is Union Electric Company's Declaration of Intention, by which the proceeding before the Commission was initiated (R. 65), which is set out in a prior part of the Record (R. 16-23). In that exhibit the proposed project and the method of operating it are described in detail:

> [That description is referred to hereinafter (at p. 10) under the caption "VI. Effects of Construction and Operation of the Project."]

The location of the project is in and near the East Fork of the Black River in Reynolds County, Missouri (R. 65), as shown on the location map designated Exhibit 2A (R. 173, 100, 102).

II. Basin Description (R. 67).

The East Fork of the Black River rises in the eastern portion of what is called the "Ozark Plateau", on the southern slope of a ridge in Iron County, Missouri, at elevation approximately 1,450 feet above mean sea level, and at a point approximately fourteen miles upstream from the site of the dam of the Taum Sauk Project (R. 18, 67). From that point it flows southwest for about nine miles with an average fall during that reach of about 80 feet per mile (R. 18, 68). Then the stream flows south two miles through a deep gorge with a rate of fall of about 38 feet per mile—then two and one-half miles with an

average fall of about 20 feet per mile through a narrow gorge to the site of the dam, at which the bed of the stream is approximately 700 feet above mean sea level (R. 19, 68).

Below the dam site the East Fork flows south for four miles, over a broad, shallow, gravel-bottomed bed with a fall of about 16 feet per mile, to a point about one mile southeast of Lesterville, Missouri, where it empties into the combined West and Middle Forks constituting the main stream of the Black River—the elevation at the point of confluence being 635 feet above mean sea level (R. 18-19, 68).

From that point the Black River flows southeast approximately ten and one-half miles over a broad, shallow stream bed to the head of the federal Clearwater Dam flood pool, at elevation 567 feet above mean sea level, then twelve miles to the head of Clearwater Dam conservation pool, at elevation 494 feet above mean sea level, and then seven and one-half miles to Clearwater Dam, the base of which is 454 feet above mean sea level (R. 19-20, 68).

From Clearwater Dam the Black River flows several hundred miles to a point in Arkansas at which it empties into the White River, which in turn empties into the Mississippi River (R. 68-69).

The Stipulation shows the approximate locations of various points along the Black River and the East Fork, measured in river miles above the mouth of the Black River (R. 69).

III. Existing Reservoir (R. 69).

The Clearwater Dam flood control project, which was completed by the Corps of Engineers in 1951, is about 257.4 river miles above the mouth of the Black River and thirty miles below the point at which the East Fork flows into that stream (R. 69). The capacity of the reservoir

created by the Clearwater Dam is 413,700 acre feet at the crest of the spillway, which is at elevation 567 feet above mean sea level, although under normal conditions only 21,920 acre feet of permanent storage are maintained at elevation 494 feet (R. 69).

IV. Streamflow (R. 69).

East Fork. There is no available record of stream flow at the site of the proposed Taum Sauk Dam (R. 20); but there is a gaging station at Lesterville on the East Fork at about 3.3 river miles downstream from the site of the proposed dam and 0.7 river miles above the mouth of the East Fork (R. 69-70).

Readings at the Lesterville gage show that the flow of the East Fork at that point, during the nine-month period covered, varied greatly from time to time—the maximum discharge being 2,080 cubic feet per second (cfs) and the minimum discharge 0.9 cfs (R. 70). The Stipulation sets out the rates of mean discharge, maximum discharge and minimum discharge in cubic feet per second (cfs), for the nine months beginning with January and ending with September of 1960—those rates varying from a maximum at the rate of 1,220 cfs during the month of May to a minimum at the rate of 1.0 cfs during the month of September (R. 70).

Flow of the Black River. Since 1939 the U. S. G. S. has maintained a stream gaging station at Annapolis on the Black River at a point eleven miles below the mouth of the East Fork—datum of the gage being 569.72 feet above mean sea level; and figures taken from or based upon readings at that gage are set out in the Stipulation (R. 70-71).

The Stipulation lists other data with respect to the flow of the Black River at various times. Included are data

showing the mean, maximum and minimum flows at the Annapolis gage for each of the nine months beginning with January and ending with September, 1960—the maximum discharge being at the rate of 3,850 cfs in May, the minimum at the rate of 80 cfs in September, and the mean varying from 781 cfs in May to 105 cfs in September (R. 71).

Calculated Flows of the East Fork. Since there was no record of actual flows at the site of the proposed Taum Sauk Dam, and the records at the Lesterville station, three miles below that site, covered only the period from January 1, 1960 to September 30, 1960, it was agreed by the engineers of the Commission staff and engineers representing Union Electric Company that calculations should be made from known data upon which reasonable assumptions might be made as to the actual flows of the East Fork at the dam site during a period of eighteen years past, which was approximately the period covered by the records at the Annapolis gaging station on the Black River; and such calculations were made (R. 71-72).

Based upon those calculations, the Stipulation states (as a reasonable assumption) that the average flow of the East Fork at the site of the proposed dam, over the 18-year period, was 105 cubic feet per second and that, during the same 18-year period, the flows at that site (1) equalled or exceeded 50 cubic feet per second approximately 50% of the time, (2) exceeded 2,000 cubic feet per second less than one-half of 1% of the time, and (3) exceeded 7,000 cubic feet per second on three occasions (R. 72).

V. Navigation (R. 72).

The East Fork. The Stipulation states that diligent search has not disclosed evidence of present or past navigation on any part of the East Fork or of any effort, recom-

mendation or proposal to improve the stream to make it suitable for navigation (R. 72-73).

The Black River. The Stipulation refers to documentary evidence showing the Black River to be navigable (for specified purposes) downstream from a point at the mouth of the East Fork. The part of the Stipulation relating to that matter is as follows:

> "There is documentary evidence showing that the Black River is navigable from a point at the mouth of the East Fork, four miles below the site of the proposed dam, to the mouth of said Black River. House of Representatives Document No. 102, 73rd Congress, 1st Session, notes on Appendix 1—Sheet No. 7, shows a Corps of Engineers' determination that 'the head of navigation for floating ties and timber' of the Black River is at or near the mouth of the East Fork. This determination was made in the engineering studies that preceded the construction of Clearwater Dam.
>
> "In a publication, entitled 'State of Missouri', edited by Walter Williams in 1904, it is stated at page 494: 'Mill centers are at Lesterville. • • • Railroad ties are floated down Black River; within the year [1902] one tie drive represented 650,000 railroad ties' [Clarification added].
>
> "A publication entitled 'Three Ozark Streams, Log of the Moccasin and Wilma', by Ward Allison Dorrance, 1937, describes a float trip down the Black River in a flat bottomed boat [Moccasin], 28 feet long and two and one-half feet wide at its widest point. The trip commenced at or near the mouth of the East Fork. It is stated at page 2: 'Behind us the east fork of the river (too difficult for navigation) flows through steep canyons. • • • The hillmen have named them "shut-ins".' (Parenthetical phrase by the author)." (R. 73).

The Stipulation then mentions the fact that the Clearwater Dam flood control project, to which we have already referred in this Statement, was completed by the Corps of Engineers in 1951 (R. 73).

The final paragraph of the part of the Stipulation entitled "Navigation" is this:

> "Centerville, Missouri, located on the West Fork of the Black River, about seven air-miles west and upstream from the confluence of the East Fork with the main stem of the Black River (composed of the combined Middle and West forks), was a lumbering center and it appears that water-borne traffic may have gone down the West Fork, past the mouth of the East Fork, and then down the Black River to Poplar Bluff, Missouri, and perhaps beyond." (R. 73).[3]

The foregoing is the only evidence in the Record as to navigation on the Black River.

VI. Effects of Construction and Operation of Project (R. 74).

Description. The Taum Sauk Project is described in the Stipulation—and in the Declaration of Intention incorporated therein—as a high head, pumped-storage electric generating station. It is to include two connected reservoirs. One of these, referred to in the Record as the "lower pool", will be formed by constructing a concrete dam across the East Fork with its foundation in the bed of that stream, which is about 700 feet above mean sea level at that point. The dam will have a free crest spill-

[3] Since 1951 any such traffic would have been interrupted by the Clearwater Dam, which was completed in that year. However, an obstruction of that kind, causing an interruption in navigation, does not prevent the stream from being treated as navigable for purposes of commerce—under the statutory definition [Federal Power Act, Section 3 (8), 49 Stat. 838, 16 U. S. C. 796 (8)].

way at 750 feet above mean sea level and will contain sluice gates at points between 715 and 734 feet above mean sea level (R. 16-17, 74).

The volume of water to be impounded in the lower pool will be approximately 6,350 acre feet, of which 4,350 acre feet will be used in the operation of the project (R. 74).

The other reservoir, referred to in the Record as the "upper pool", will be constructed on top of an adjoining mountain at an elevation of more than 1,500 feet above mean sea level (R. 17).

A pressure tunnel and conduit, approximately 6,400 feet in length, will connect the upper pool with a pumping and generating station to be located on an open channel (or tailrace) running to the lower pool; and that station will house two reversible pump-turbine units (R. 17).

The operations to be conducted will consist of (1) pumping water from the lower pool to the upper pool during hours when the demand for electricity is low—using for that purpose the reversible turbines as pumps under power supplied from available generating units—and (2) allowing the water thus stored in the upper pool to flow through the tunnel and open channel and thus to operate the turbines by water power for generation of electricity during periods of peak demand or in emergencies. After passing the turbines the water will discharge into the open channel to the lower pool, thus completing the cycle of operation and returning to the lower pool the water previously pumped to the upper pool (R. 17-18).

Of the structures and equipment constituting the project works only the dam will be constructed in the stream (R. 17), and no generating equipment will be placed in the dam (R. 18). The proposed pumping and generating station (at a point 295.5 river-miles above the mouth of the Black River—R. 69) will be two miles above the

dam site (which is at a point 293.5 river-miles above the mouth of the Black River—R. 69). As shown on Exhibit 3A (R. 179, 100, 102), the generating station is at the head of the open channel, into which water from the upper reservoir flows through a tunnel, and is approximately 1,400 feet from the East Fork into which the channel empties. (See also Exhibit 3D, R. 183, 101, 102.)[4]

Two 138,000 volt transmission circuits, carried approximately thirty miles to the northeast, will connect the pumping and generating station with Union Electric's Rivermines Substation, which is a point of junction with the Company's interconnected primary transmission system. Each circuit will be separately connected to one of the pump-turbine units through switches, circuit breakers and transformers (R. 20).

Operation—Effects on East Fork and on Black River. The possible effects of project operations on the East Fork below the dam and on the Black River below the mouth of the East Fork, as described in the Stipulation, are of three classes: (1) those during the period of impoundage, (2) those during periods of subsequent operations under what may be called normal conditions, and (3) those during periods of subsequent operations under what may be called abnormal conditions.

The Period of Impoundage. Part of the flow of the East Fork will be retained to impound the water which will form the lower pool. If during the impoundage the flow in the East Fork were at the calculated average rate of 105 cubic feet per second and the flow in the Black River at the Annapolis gage were at the historical

[4] The distance of the generating station (at the head of the open channel or tailrace) from the East Fork is not stated in the Record; but that distance, which is 1,430 feet, may be measured on Exhibits 3A (R. 179, 100, 102) and 3D (R. 183, 101, 102) which are drawn to scale.

average rate of 582 cubic feet per second, and if 50 cubic feet per second were retained by the dam (the remainder being allowed to pass downstream), the lower pool would be filled in approximately 63 days and the stage of the Black River at the Annapolis gage during that period would be reduced by 0.1 feet. If under the same flow conditions, all of the flow of the East Fork were retained by the dam, the lower pool would be filled in less than 32 days and the stage of the Black River at the Annapolis gage during that period would be reduced by 0.2 feet. If during the impoundage a high flow should occur in the East Fork, the lower pool might be filled in a matter of hours (R. 74).

After the Period of Impoundage. Under the Company's plan of operation there will be only one impoundage—6,350 acre feet of water to form the lower pool—and thereafter water will be passed downstream through or over the dam in amounts equal to the inflow from the stream above. There will be no alternating, retaining and releasing of the flow of the stream, as in the case of the usual type hydroelectric facility (R. 74, 21, 197).

Controllable sluices in the dam will be capable of discharging downstream (from the lower pool) approximately 2,000 cubic feet per second when the lower pool is at elevation 734 feet above mean sea level and 2,800 cubic feet per second when the pool is at elevation 750 feet above mean sea level (R. 74).

Normal Operation (Pumping and Generating Cycles). In normal operation, as contemplated in the Company's plan, there will be 4,350 acre feet of water in the upper pool at the end of a pumping cycle, and the lower pool will be at elevation 734 feet above mean sea level and will be kept at that level until the next generating cycle begins, thus leaving sufficient storage capacity to receive and retain all of the water released into it from the

upper pool during the generating cycle. At the end of a generating cycle the volume of water in the lower pool will be increased by the 4,350 acre feet received from the upper pool and will be at elevation 750 feet above mean sea level. When the lower pool is at the 734 elevation, flows into it from the stream above, up to 2,000 cubic feet per second, could be discharged through the dam and hence downstream. When the pool is at elevation 750 feet above mean sea level, flows into it from the stream above, up to approximately 2,800 cubic feet per second, could be discharged through the dam, and any inflow in excess of 2,800 cubic feet per second would flow over the free crest of the dam and hence downstream. There would be no increase or decrease (attributable to the existence or operation of the project) in the natural stage and flow of the East Fork below the dam (R. 74-75).

Abnormal Conditions—Possible Effects. The Stipulation refers to the possibility of the lower pool being at or above elevation 750 feet when a generating cycle begins and lists the conditions necessary to the creation of that condition—the conditions being these: (1) that there be a flow into the lower pool from the stream above in excess of the capacity of the sluices in the dam for a period sufficient to accumulate 4,350 acre feet in the pool (in addition to the approximately 2,000 acre feet in the pool at elevation 734 feet), **or** (2) that there be a mechanical failure or malfunction in the sluices, so that the inflow into the lower pool from the stream above could not be passed downstream, **or** (3) that the Company "vary from its stated intention" to maintain the lower pool at elevation 734 feet, **or** (4) that there be a combination of those conditions (R. 75-76).

Following that, the Stipulation lists certain hypothetical effects, all of which are subject to conditions stated as follows:

> "To present the situation which would result in an extreme increase in stage and flow at and below the mouth of the East Fork attributable to the existence and operation of the project, it must be assumed that simultaneously: the upper pool is full (4,350 acre feet); one or more of the conditions described in the preceding paragraph has caused the lower pool to be full (750 feet above mean sea level); the natural flow in the East Fork is 105 cubic feet per second; the natural flow in the Black River at the Annapolis gage is 582 cubic feet per second; the sluice in the dam is closed and not operated; and a generating cycle at a rate of 350 megawatts (average turbine discharge 6,800 cubic feet per second) is started and continues until all the water is withdrawn from the upper pool." (R. 76).

"If the above assumed facts were to occur simultaneously," the Stipulation says, the stage and flow of the (non-navigable) East Fork below the dam would be increased—the amount of the increase at the Lesterville gage being approximately 5.7 feet, cresting about nine hours after the start of the eight-hour generating cycle and gradually subsiding to the natural stage after completion of that cycle. The increase in stage at the Annapolis gage in the Black River would be 3.4 feet, cresting 14½ hours after the start of the generating cycle, with a maximum rate of rise of approximately 0.6 feet per hour, and gradually subsiding to the natural stage after the crest (R. 76-77).

As to the rates of rise and increases in stage, both in the non-navigable East Fork and in the navigable portion of the Black River, the Stipulation says:

> "* * * On numerous occasions, natural conditions have caused both greater rates of rise and greater increases in stage in equal periods of time." (R. 77).

With the increases in stage there would be corresponding peak increases in flow of 6,700 cubic feet per second in the East Fork at the Lesterville gage and 3600 cubic feet per second in the Black River at the Annapolis gage. As with the increases in stage, the flows would decrease gradually after reaching their peaks (R. 77).

Under the same hypothetical conditions, it would be possible to shift from generating to pumping, thereby withdrawing 5,000 cubic feet per second from the lower pool, instead of discharging 6,800 cubic feet per second, and shutting off all of the flow in the East Fork below the dam, which would result, several hours later, in reducing the natural stage in the Black River at the Annapolis gage by 0.2 feet (R. 77).

It is stated in the brief for the Commission (at p. 6) that in the event of "malfunction or emergency, or of abnormal flows—conditions stipulated to be possible—the project might significantly affect the level both of East Fork and the Black River." Immediately following that statement counsel for petitioner state "for example" the situation which, as the Stipulation says (R. 76), would result in an extreme increase in stage and flow.

The statement thus made at page 6 of their brief is repeated, in effect, at pages 33-34; and at one point in the Examiner's decision it is indicated that "operation under emergency conditions" could produce adverse effects on downstream waters (R. 93, second paragraph).

Those statements are erroneous. What the evidence shows is what we have recounted here—summarizing the more detailed statements at pages 75-78 of the Record. And as the Stipulation makes clear, in order to produce the extreme increases in stage and flow there referred to "it must be assumed" that all of the conditions there hypothesized will occur simultaneously (R. 76).

1949 Flood. The Stipulation refers to a letter (with enclosures), dated April 12, 1960, from the Company to the Commission, analyzing the effect of a hypothetical operation of the plant "on top of the flood of January 1949" (R. 77-78), which letter and enclosures were incorporated in the Stipulation [R. 66 (Item 7)]. Those documents were separately offered in evidence as Exhibits 7A and 7B (R. 206-211, 101, 102). As stated in the Stipulation, it is demonstrated in those documents that a generating cycle on top of the flood flow, under the circumstances there assumed, "could cause an increase in stage" of the Black River at the Annapolis gage of approximately one foot, occurring 12½ hours after the beginning of the generating cycle; and pumping immediately after completion of such a generating cycle "could cause a reduction in stage of .35 feet at the Annapolis gage, occurring 8½ hours after pumping started." (R. 77-78).

Evidence as to Effect on Navigation. While this proceeding was pending before the Commission, Union Electric Company filed a tentative application for a license to cover its Taum Sauk Project—under the circumstances hereinafter stated. The Federal Power Commission, following its established practice, requested the comments and recommendations of the Corps of Engineers of the United States Army in regard to the project and its possible effect on navigation. The response to that request is in the Record as Exhibit 10 (R. 228, 102), which is a letter addressed to the Chairman of the Commission and signed by Colonel Robert M. Tarbox of the Corps of Engineers, Assistant Director of Civil Works for Southwestern Divisions. The letter says:

> "The proposed dam would be located approximately 15 miles upstream from the upper limit of the Corps of Engineers' Clearwater Reservoir project and about 85 miles above the head of an authorized navigation project (inactive) on the Black River. Construction

and operation of the applicant's project would have no appreciable effect on the Clearwater Reservoir project or navigation on the Black River." (Exhibit 10, R. 228, 102).

VII. Public Lands or Reservations (R. 78).

The project will be located solely on privately owned lands, and the transmission line leading therefrom will be located on private ways except where it will cross—or occupy parts of—State or County roads or highways pursuant to permission granted by the proper authorities. No State or Federal lands or reservations will be occupied or flooded by the project (R. 78).

VIII. Other Factual Matters (R. 78).

The Company's Interstate System. Union Electric Company operates an interconnected transmission and distribution system in the states of Missouri, Illinois and Iowa and owns generating plants in each of those states which are interconnected with its transmission system (R. 78). The Taum Sauk Plant will be similarly connected—by the transmission line from the generating station of the project to a point of junction, at Rivermines, Missouri Substation, with the Company's primary transmission lines (R. 78, 20). Electricity generated at the Taum Sauk Plant will be utilized in Missouri and will be transmitted to and utilized in Illinois and, possibly, in Iowa (R. 79).[5]

[5] At page 19 of the brief for the Commission there is a description (without reference to the Record) of coordination of generating units in an electric power system. That description, although not supported by the Record, is generally accurate. But it is erroneous insofar as it indicates that the Taum Sauk units may be used as "spinning reserve", rotating in synchronism with other units and primed to feed energy into the system immediately. And the similar statements (in the brief at page 5 and in the Examiner's

Approval by State Authorities. The Missouri Public Service Commission, which has jurisdiction over Union Electric Company as a public utility company of Missouri (Revised Statutes of Missouri 1959, Chapter 386, Sections 386.010-386.610; Chapter 393, Sections 393.010-393.290), approved and authorized the construction and operation of the project (Exhibit 4B, R. 188-192, 101, 102). As stated in the same Exhibit (4B), an additional order of the Missouri Commission was to be applied for after completion of the plans for the transmission line (R. 191).[6]

Tentative Application for License. On June 10, 1960, while this proceeding was pending before the Commission, Union Electric Company filed with the Commission an application for a license relating to the proposed project, which is in the Record as Exhibit 8 (R. 213, 101, 102). As explained at the beginning of that exhibit, the Company maintained that no license was required but was filing the application so that if the pending proceeding should be determined against its contention, action on the application might be begun at once. And it was requested, in effect, that the application be held in abeyance until the pending proceeding had been concluded.

At the hearing it was stated that, in conferences of Company representatives with members of the Commission staff, it had been agreed that, "upon the filing of a skeleton license application", work on the project might be begun (R. 60). The Commission treated the application for a license as tentative, pending determination of the issues

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decision at page 95 of the Record) that the project will provide "an instantaneous reserve" to pick up load in the event of breakdown of other units are also incorrect.

[6] That order does not appear in the Record, since it was issued after the proceeding before the Commission had been concluded.

in this proceeding (See statement in the Decision of the Presiding Examiner—R. 80), as did the Court of Appeals (R. 272; 326 F. 2d 535 at p. 539).

The Decisions Below.

The Decision of the Presiding Examiner (R. 79-100), incorporating his findings and conclusions, was to the effect that the project would affect the navigable capacity of the Black River and, consequently, the interests of interstate commerce. The Examiner declined to pass upon the legal question whether or not a license was required because of the fact that electricity would be transmitted from the project in interstate commerce, although he found that such was the fact and that thereby the interests of interstate commerce would be affected.

The Commission's Opinion and Order (R. 143-155) adopted the findings and conclusions of the Examiner as to effect on navigability of the Black River and, thereby, on the interests of interstate commerce. The Commission also ruled upon the question which the Examiner had found it unnecessary to decide, holding that the proposed transmission in interstate commerce of energy to be generated at the Taum Sauk Plant showed that the interests of interstate commerce would be affected within the meaning of Section 23 (b) of the Federal Power Act. Most of the Commission's opinion is devoted to demonstration of that proposition (R. 145-154). But it concurred in the conclusion of the Examiner that a license was required for the project because of the stated effect on the navigable capacity of the Black River (R. 154-155).

The Decision of the Court of Appeals (R. 269; 326 F. 2d 535) reversed the Commission's decision as to both of the premises upon which it was based. It rejected, as contrary to the intent of the statute, the Commission's theory of licensing jurisdiction based solely on the pro-

posed transmission in interstate commerce of energy to be generated at the plant (R. 289-296; 326 F. 2d 535 at pp. 548-553). And it held that the finding of effect on navigability was not supported by substantial evidence and was inconsistent with conceded facts not mentioned in the Examiner's Decision or the Commission's Opinion and Order (R. 286-288, 296-297; 326 F. 2d at pp. 547-548, 553-554).

SUMMARY OF ARGUMENT.

I.

Contrary to the Commission's interpretation, the "interests" of interstate and foreign commerce, referred to in Section 23 (b), are those pertaining to navigable waters as highways of commerce.

I-A. The basic reference in Section 23 (b) to the jurisdiction of Congress over non-navigable streams indicates that the provision regarding "construction" in such a stream and effects upon "interests" of interstate commerce was directed to what would affect the navigable water into which the stream flowed.

The nature and extent of Congressional jurisdiction over non-navigable streams, defined in *United States v. Rio Grande Dam & Irrigation Co.* (1899), 174 U. S. 690, have been defined also in more recent decisions—without deviation from the essential premises and conclusion expressed in that case. *State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.* (1941), 313 U. S. 508, among other decisions of this Court, re-affirmed the essential proposition that the constitutional objective of Congressional power over non-navigable streams is protection or improvement of the navigable waters into which they flow.

That proposition is not altered by the fact that a particular statute may be designed to serve other purposes and that its proponents may have been actuated by other motives. Such other purposes and motives are irrelevant, *if the statute is reasonably adapted to accomplishment of the constitutional objective: protection or improvement of navigable water.*

In the case at bar the fact, chiefly relied on in the brief for the Commission, that proponents of the Federal Power Act were actuated by other purposes and motives, is irrelevant. For whatever such purposes and motives may have been, the constitutional objective of the questioned part of Section 23 (b) is that indicated by the basic reference to the "jurisdiction" of Congress over non-navigable streams.

I-B. The purpose thus indicated by the basic reference to the jurisdiction of Congress is confirmed by other provisions of Section 23 (b). (1) The first sentence of the section, which relates to projects in *navigable* waters, was incorporated in the section (by one of the 1935 amendments) for the purpose of bringing together requirements regarding water power projects which might affect navigable waters. (2) Significant also are the specific terms used in the immediate context of the questioned provision of Section 23 (b)—"construction" of a dam or other "project works" (meaning *"physical structures"* of a project) "across, along, over, or in" a stream of the defined class, and the terms used in stating the question to be decided by the Commission: whether the *"proposed construction"* will affect the *"interests of interstate or foreign commerce"*. In that context—and in view of the basic factors referred to under Point I-A—the interests within the scope of Section 23 (b) are the interests of such commerce with respect to the waters with which the statute deals.

I-C. The Commission's present construction of Section 23 (b) is contrary both to the legislative history and to prior interpretation of the section by the Commission itself.

The Legislative History. In 1920, when the original Federal Water Power Act was under consideration, the

opinion was expressed by members of the Congress that the Congressional power over non-navigable tributaries was limited to protection of "downstream navigation or navigability" (See pp. 48-49 and Appendix B).

The legislative history of the 1935 amendments is important. By those amendments the Federal Water Power Act was thoroughly revised; and Section 23 was amended in important particulars.

The revision of the bill was sponsored and explained (in statements to the House and Senate Committees) by members of the Federal Power Commission and by the Solicitor of the Commission. The explanations indicated (1) that the "jurisdiction" of Congress over non-navigable streams extended to "what might affect navigation" and that those were the cases which fell "under Section 23 of the Act", (2) that the expression "effect upon interstate commerce" was synonymous with effect upon navigability, (3) that the 1935 amendments were not intended to enlarge the jurisdiction of the Commission, and (4) that the jurisdiction of Congress over non-navigable waters was that defined in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690. The assurances thus given to the Senate and House Committees were relied upon and incorporated in their Reports.

Administrative Interpretation by the Federal Power Commission, for many years, was directly contrary to the interpretation it adopted, for the first time, in this case. In a decision by the Commission in 1954, *California Oregon Power Co.*, 13 F. P. C. 1, 3; 3 PUR 3d 207, 210, the interpretation adopted in the case at bar was rejected as "unwarranted" under the Federal Power Act. And in the Annual Report of the Commission for the year ended June 30, 1962, its decision in this case was referred to—under the heading "New Regulatory Policies"—as one of those 'establishing 'firsts' in policy".

The court below concluded that, in view of all of the circumstances stated in its decision, the Commission's interpretation had acquired the force of law—citing *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 114-115.

I-D. The argument for the Commission is based upon the mistaken assumption that in Section 23 (b) Congress exercised its jurisdiction over interstate commerce generally, rather than its jurisdiction over waters as media of such commerce.

We do not question the proposition that Congress may regulate intrastate activities which substantially affect interstate commerce. Upon that principle it might regulate plants for generating electricity to be transmitted in interstate commerce and might vest the Commission with authority over such plants, as stated in the brief for the Commission (p. 15). [In fact, however, it has expressly denied to the Commission jurisdiction over generating plants, except as otherwise specifically provided in Parts II and III of the Act.] But the power of Congress in that respect is without bearing upon the issue presented here.

What Congress has provided against in Section 23 (b) is not what will "affect interstate or foreign commerce" generally but what will affect the interests of such commerce with respect to the waters with which the statute deals.

I-E. The Commission's interpretation would produce absurd results.

As the Court of Appeals suggested, an anomalous situation would be created if the plan to transmit in interstate commerce were changed—either before completion of the project or after an initial period of operation. In that event, the basis of jurisdiction, under the Commission's interpretation, would cease to exist. But the li-

cense would remain in effect, since there is no provision of the statute authorizing cancellation in such a case; and it is provided that a license may not be surrendered except "upon mutual agreement between the licensee and the Commission" (Section 6, 49 Stat. 841, 16 U. S. C. 799).

The Court of Appeals suggested that, on the Commission's theory of jurisdiction, there is no logical basis for distinction between water power plants and steam plants, which concededly are not within the licensing jurisdiction of the Commission. The distinction stated in the brief for the Commission (at pages 29-30) is based on the fact of "utilization" of water resources of the nation by water power plants which use "the power of falling water to drive turbines and thereby generate energy." But in fact steam plants also "utilize" water resources of the nation, as recognized in the 1962 Annual Report of the Commission.

The attempted distinction is untenable from another viewpoint. Assuming two precisely similar hydroelectric generating plants on non-navigable streams—neither of them affecting downstream navigability, but one transmitting energy in interstate commerce, the other transmitting only within the state—both would be utilizing "the power of falling water to drive turbines and thereby generate energy." Yet the one transmitting energy in interstate commerce would be under the licensing jurisdiction of the Commission, while the other plant would not be.

II.

The contention that the Court of Appeals erred in rejecting the Commission's finding that the project would affect navigable capacity of the Black River is beyond the scope of review here, since it was not asserted as a ground of the petition for certiorari.

And the contention, considered on its merits, is not maintainable.

II-A. Whether or not this contention should be considered is, of course, within the Court's discretion, despite the deviation from the applicable rule—as we understand it.

Under Rule 23 of this Court, the petition for certiorari was required to contain the "questions presented for review" [paragraph (1) (c)] and a statement of "the facts material to the consideration of the questions presented" [paragraph (1) (c)]. Under Rule 40 petitioner's brief on the merits of the case "may not raise additional questions or change the substance of the questions already presented" in the petition for certiorari [Rule 40(1)(d)(2)].

The Commission's petition for certiorari stated and explained a single question as the ground on which the writ was sought. That was the question which has been argued here under Point I of the brief for the Commission—and is dealt with under our Point I. There was an incidental statement and reservation in a footnote (at page 2 of the petition), of the question which has been made the subject of Point II of the brief for the Commission on the merits. But there was no statement in the petition either (1) of the facts relating to the question referred to in the footnote or (2) of any error in the ruling of the court below with respect to that question.

Was the incidental statement and reservation in the footnote (of the petition for certiorari) sufficient under Rule 40(1)(d)(2)? Having regard to the spirit and reason of the rule and to the rationale of the decisions cited in our argument upon this point, we think that the question should be answered in the negative.

II-B. The argument for the Commission upon the additional question—as to the effect on navigability—is directed to a false issue.

In the first place, the factual premises assumed in the brief for the Commission (at pp. 10-11 and pp. 33-35) are erroneous in several particulars. In the second place, the basis of the decision by the court below, rejecting the Commission's finding with respect to effect on navigability, was not what is stated in the brief for the Commission (at pp. 10-11 and pp. 34-35).

The argument with respect to this matter in the brief for the Commission is directed to the proposition that the authority of Congress—and of the Commission—extends to preventive regulation, which is indisputable. No contention contrary to that was made in the court below, nor does the decision of that court indicate any such mistaken notion. The argument made here on behalf of the Commission is completely foreign to any issue in the case.

II-C. The court below properly held that the finding of the Commission as to effect upon the navigability of the Black River was not supported by substantial evidence.

The primary fact is that the navigable capacity of the Black River is very limited. It was shown, as a matter of history, to be navigable for the purpose of floating ties and timber. The question presented was whether there was a sufficient evidentiary basis for a conclusion that the construction and operation of the project in question would substantially affect its navigable capacity for that purpose.

The only direct evidence upon that question was an opinion in a letter from the Office of the Chief of Engineers of the United States Army, which stated that construction and operation of the project would have "no appreciable

effect" either upon the Clearwater reservoir (a federal project) or upon "navigation on the Black River."

The Examiner's decision, adopted by the Commission, that navigability of the Black River would be affected is based entirely upon possible effects upon the "stage" (level) and rate of flow of water in the Black River under hypothetical conditions. The court below found that the conclusions reached in that respect were based upon speculation not justified by the facts, including the fact that the maximum changes in stage and flow were less than those which had frequently been produced by natural conditions in equal periods of time. And it pointed out that the decision of the Commission ignored the opinion which it had obtained from the Corps of Engineers, showing that the project would not affect navigation. Upon those premises, demonstrated in detail, the court below held that the Commission's finding was not supported by substantial evidence.

Although that conclusion of the court is sufficiently based upon its stated premises, it is supported also by the fact that, in this case, there was no evidence that the designated changes in *stage* and *flow* would affect the *navigability* of the stream—emphasizing the opinion from the Office of the Corps of Engineers, which was disregarded in the Commissioner's decision.

II-D. In the brief for the Commission a number of extraneous considerations are mentioned. While they are irrelevant to any issue in this case, most of them are also erroneous. We refer specifically to certain of them because, we think they should not be left unchallenged.

ARGUMENT

I.

The fact that electric energy to be generated at the project will be transmitted in interstate commerce is not a valid basis for a finding that the proposed construction in the non-navigable stream will affect the "interests" of interstate commerce within the meaning of the statute.

The interests referred to in the statute are those pertaining, directly or indirectly, to navigable waters as highways of commerce.

Prefatory Statement

The Statute. Section 23 (b) is in Part I of the Federal Power Act. That Part consists of the sections of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended in 1935 (49 Stat. 838, 16 U. S. C. 791a et seq.). The title of the Act was:

> "An Act To create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes." (41 Stat. 1063)

The 1935 amendments were enacted as part (Title II) of the Public Utility Act of 1935 (49 Stat. 838). Under that Title eleven of the thirty sections of the Federal Water Power Act were amended, and Sections 1 to 29, as amended, were designated as Part I of the Act. Two sections (25 and 30) were repealed. And the Act was further amended by adding new sections in two groups designated Part II and Part III (49 Stat. 847-863).

In Part II, consisting of sections numbered 201 through 209 (49 Stat. 847-854, 16 U. S. C. 824-824h), Congress gave the Federal Power Commission jurisdiction over the transmission of electric energy in interstate commerce and over the sale at wholesale of electricity transmitted in interstate commerce, as well as jurisdiction over facilities for such transmission and sale, but expressly denied to the Commission jurisdiction over facilities used for "the generation of electric energy" and over facilities used in local distribution or only in intrastate commerce—except as specifically provided in Part II and Part III [Sec. 201 (b), 49 Stat. 847, 16 U. S. C. 824 (b)].

Part III of the Act (Sections 301-319, 49 Stat. 854-863, 16 U. S. C. 825-825r) consists chiefly of procedural and administrative provisions.

Section 23 (b) of the Act, as it now stands, includes some important amendments made in 1935. In the following transcript of the text the amended portions are in italics.

> "*(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act.* Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream

or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce *with* foreign nations and among the several States *shall before such construction* file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality *shall not construct, maintain, or operate such dam or other project works* until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws."

(Act of June 10, 1920, c. 285, § 23, 41 Stat. 1075; Act of Aug. 26, 1935, c. 687, Title II, § 210, 49 Stat. 846—16 U. S. C. 817.)

The first sentence, relating to projects in *navigable* waters, did not constitute a new requirement. According to the Senate and House Committee Reports it represented the effect of the River and Harbor Act of 1899, when read with the Water Power Act, and was incorporated into Section 23 (b) in order to bring together requirements regarding the "construction of water power projects."[7]

In the second sentence the word "*with*" before "foreign nations" was substituted for "between". The words

[7] Relevant parts of those reports are set out in Appendix D of this brief and are under Point I-C, post, at pp. 50-51.

"shall before such construction" were substituted for the words "may in their discretion". And the words *"shall not construct, maintain or operate such dam or other project works"* were substituted for the words "shall not proceed with such construction" (49 Stat. 846, Sec. 210).

Of the three amendments last mentioned, the second was an important one—making it mandatory instead of discretionary to file with the Commission a declaration of intention before beginning construction of a "dam or other project works" in a non-navigable tributary of navigable water. And the third made it illegal to "maintain or operate", as well as to "construct", without a license, a dam or project works after a finding by the Commission that the "construction" thereof would affect the interests of interstate or foreign commerce.

The Issue. The question presented is whether or not the "interests" referred to in Section 23 (b) will be affected by the "proposed construction". The Commission concluded that those interests would be affected, because electricity to be generated by water power at the project would be transmitted in interstate commerce (R. 154). The Court of Appeals rejected that conclusion—holding, in effect, that the interests of interstate and foreign commerce referred to in the statute were those related to commerce on navigable waters (R. 289, 293-296; 326 F. 2d 535 at pp. 548, 551-553).

That holding of the Court of Appeals is assailed in the brief for the Commission as contrary both to the *letter* and to the *purpose* of the statute (Br. 14-15). We join issue upon both phases of that contention.

Major Factors. The phrase "interests of interstate or foreign commerce" must be read, of course, in the light of its context and in view of "the traditional rule of statutory construction which counsels against giving to

general words a meaning totally unrelated to more specific terms of a statute * * *" (*Weyerhaeuser Steamship Company v. United States*, 372 U. S. 597, 600-601). The context to be considered includes not only the immediately related language of Section 23 (b), which is of primary significance, but the provisions of other parts of the statute which disclose its purpose and scope.

The legislative history of the statute as well as the long-followed administrative interpretation of the provision now in question—which are not fully narrated in the brief for the Commission—supply valuable information.

A factor of prime importance, and one which is not fully recognised either in the Commission's decision or in the brief supporting it here, is the basis of Federal power over the non-navigable waters which are referred to in Section 23 (b) as within the "jurisdiction" of Congress. Yet that factor is indicated unmistakably in the immediate context of the provision here in question and is emphasized by its legislative history.

The court below considered also certain of the anomalous consequences of the Commission's recently adopted interpretation of the statute. Additional considerations might have been pointed out in that connection and are pointed out in the following parts of our argument, which is directed to

A—the nature and extent of the jurisdiction of Congress over non-navigable tributaries of navigable waters,

B—the significance of specific terms employed in Section 23 (b),

C—the legislative history of the provision in question and the history of its administration by the Federal Power Commission,

D—the theory and decisions relied on in the brief for the Commission, and

E—anomalous consequences of the Commission's recently adopted interpretation.

I-A

The scope of the questioned provision of Section 23 (b) is shown by the basic reference in that section to the jurisdiction of Congress over non-navigable streams.

That is the jurisdiction to adopt, with respect to non-navigable tributaries of navigable waters, measures reasonably adapted to protection or improvement of those waters as highways of interstate or foreign commerce.

The questioned provision is applicable to a "stream or part thereof"—other than a navigable stream—"over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States".

What is that jurisdiction? Neither the Commission's decision nor the brief of its counsel here contains a definitive answer to that question.

The Commission, after finding that Congress had jurisdiction over the East Fork—which was obvious, since the stream helped to feed other streams which were navigable—devoted the major part of its opinion to recounting the objectives or motives of proponents of the legislation (R. 146-155). But it did not attempt to delineate the boundaries of that jurisdiction. Indeed it assumed that, since the jurisdiction existed, the Congressional power over the use of water in the non-navigable stream was plenary, even though the use would have no effect whatever upon navigable water (R. 154).

The brief for the Commission in this Court is apparently grounded upon a similar premise. It assumes that "utilization" of the water in a non-navigable tributary is subject to Federal restraint regardless of effect upon waters constituting highways of commerce (Brief for F. P. C., pp. 20-29).

The jurisdiction of Congress over non-navigable tributaries of such waters has been many times defined by this Court. And the decisions, from the earliest to the latest, make it clear that that jurisdiction of Congress, under the Commerce Clause, is based upon its power to protect or to improve navigable waters which are used or are capable of use as highways of commerce.

In *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, decided in 1899, the Court discussed this jurisdiction thoroughly. As to the basis of the jurisdiction it said:

> "In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water courses of the country, even against any state action."
>
> 174 U. S. 690 at p. 703.

Referring to Section 10 of the River and Harbor Act of 1890 (26 Stat. 454), the Court said:

> "Evidently congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the national government, and that nothing should be done by any state tending to destroy that navigability without the explicit assent of the national government, enacted the statute in question; and it would

be to improperly ignore the scope of this language to limit it to the acts done within the very limits of navigation of a navigable stream."

174 U. S. 690 at p. 708.

Then, after pointing out that the suit before it had been instituted by the Attorney General to enjoin an obstruction, the Court thus pointed out the limitations within which the federal power might be exercised in such a case:

"Of course, when such proceedings are instituted, it becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream. It does not follow that the courts would be justified in sustaining any proceeding by the attorney general to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. In the course of the argument, this suggestion was made, and it seems to us not unworthy of note, as illustrating this thought. The Hudson river runs within the limits of the state of New York. It is a navigable stream, and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it, and contributes to the volume of its waters, is the Croton river, a nonnavigable stream. Its waters are taken by the state of New York for domestic uses in the city of New York. Unquestionably, the state of New York has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed."

174 U. S. 690 at p. 709.

The essential doctrine of that decision has been followed consistently in later decisions.

State of Oklahoma ex rel. Phillips, Governor v. Guy F. Atkinson Co. (1941), 313 U. S. 508, is a case in point—and an important one. That case involved construction of the Denison Dam and Reservoir in a portion of the Red River which was alleged to be non-navigable, although the stream was admittedly navigable in a lower stretch some miles below the site of the proposed project. Dealing with the complaint of unconstitutionality made by Oklahoma, the Court said:

> "And it is clear that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions. United States v. Rio Grande Dam & Irrigation Co., 174 U. S. 690, 703, 706, 708, 19 S. Ct. 770, 775-777, 43 L. Ed. 1136; United States v. Utah, 283 U. S. 64, 90, 51 S. Ct. 438, 446, 75 L. Ed. 844. It is obvious that at least incidentally Congress has done precisely that in this case. Congress was not unmindful of the effect of this project on the navigable capacity of the river. In authorizing it, Congress exercised all the power it possessed to control navigable waters."
>
> 313 U. S. 508 at p. 523.

It was recognized that the project was part of a comprehensive plan involving control of the watersheds of the Mississippi River basin. But the constitutional purpose of protecting and improving navigability, both on the lower stretches of the Red River and on the Mississippi into which it flowed, nevertheless stood out as an objective of the legislation. As the Court said,

> "There is no constitutional reason why Congress cannot under the commerce power treat the watersheds

as a key to flood control on navigable streams and their tributaries. * * * We need no survey to know that the Mississippi is a navigable river. We need no survey to know that the tributaries are generous contributors to the floods of the Mississippi. And it is common knowledge that Mississippi floods have paralyzed commerce in the affected areas and have impaired navigation itself."

313 U. S. at p. 525.

And in the same connection it was said:

"For just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries."

313 U. S. at pp. 525-526.

United States v. Grand River Dam Authority (1960), 363 U. S. 229, involved a project at Fort Gibson on the Grand River, a non-navigable tributary of the navigable Arkansas River. That also was a multiple purpose project. But the purpose which showed it to be within the power of Congress was that of protecting or improving navigability of the Arkansas River.

"Congress, by the 1941 Act, already mentioned, adopted as one work of improvement 'for the benefit of navigation and the control of destructive floodwaters' the reservoirs in the Grand River. That action to protect the 'navigable capacity' of the Arkansas River (United States v. Rio Grande Dam & Irrigation Co., 174 U. S. 690, 708, 19 S. Ct. 770, 777, 43 L. Ed. 1136) was within the constitutional power of Congress. We held in State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U. S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487, that the United States over the objection of Oklahoma could build the Denison

> Dam on the Red River, also nonnavigable, but a tributary of the Mississippi."
>
> 363 U. S. 229 at p. 232.

In those and other recent cases there is no departure from the doctrine enunciated many years before in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690. Indeed that case is cited in both the *Oklahoma* and the *Grand River Dam Authority* cases as prime authority with respect to the jurisdiction of Congress over non-navigable tributaries of navigable waters. And the rulings upon the specific questions presented in the recent cases are based upon the principle, clearly enunciated in the *Rio Grande* case, that

> "* * * the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures *to preserve the navigability of the navigable water courses of the country* * * *." (*Emphasis ours.*)
>
> *U. S. v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690 at p. 703.

The decision in the *Rio Grande* case, in defining the jurisdiction of Congress, does not refer to measures for "improvement" of navigable water courses. But the rationale of the decision leads logically to the conclusion that improvement, as well as preservation, of the navigability of navigable waters is within the Congressional jurisdiction over non-navigable tributary streams under the Commerce Clause. And the doctrine of the case has been properly so treated in decisions since that time.

It is true, as this Court has often pointed out, that

> "It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect

on the arteries of interstate commerce as to warrant it."

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U. S. 508 at p. 527.

And it frequently occurs that the question of whether a project "will serve the interests of navigation involves engineering and policy considerations for Congress and Congress alone to evaluate." When the Congress reaches a decision upon such a question,

"Courts should respect that decision until and unless it is shown to 'involve an impossibility', as Mr. Justice Holmes expressed it in Old Dominion Land Co. v. United States, 269 U. S. 55 * * *."

United States v. Twin City Power Company, 350 U. S. 222 at p. 224.

But those rules of judicial review do not at all detract from the substantive definition of the actual jurisdiction of Congress with respect to non-navigable tributaries of navigable waters.

Other Purposes and Motives. Both the Commission decision and the brief in support of it here emphasize objectives and motives of the conservationists who advocated legislation such as that finally embodied in the Act of 1920.

The Commission decision says that the conservationists regarded it "within the power of Congress" to control the whole river system "for all beneficial public purposes, including domestic and municipal water supply, agricultural and industrial use, the development of power and recreation as well as navigation" (R. 147). The brief for the Commission also lays stress upon objectives and purposes of the conservationists (Brief, pp. 22-23). And it is said that those were "the purposes" which, after long

controversy, were "embodied in the Water Power Act of 1920" (Brief, p. 23).

There are several answers to all that is said along that line in the Commission's decision as well as in the brief of its counsel here.

First: It is to be noted that many, if not most, of the objectives of the conservationists are so related to preservation or improvement of navigable waters that they are well within the jurisdiction of Congress under the rule which we have been discussing. Watershed development and flood control on non-navigable tributaries are within that jurisdiction, as held in the cases we have cited.

Second: Other objectives, though not so related to preservation or improvement of navigable water as to supply the jurisdictional basis for Congressional action, may nevertheless be accomplished, if the jurisdictional basis exists otherwise. That means, of course, that legislation with respect to a non-navigable stream must be related to the interests of navigation on the waters to which the stream is tributary. In that event

> "* * * the fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power."
>
> *State of Arizona v. State of California*, 283 U. S. 423 at p. 456.

Or as stated in a more recent decision,

> "If the interests of navigation are served, it is constitutionally irrelevant that other purposes may also be advanced."
>
> *United States v. Twin City Power Company*, 350 U. S. 222 at p. 224.

Third: The *motives* of those who advocate legislation or of members of Congress who enact it are beyond the boundaries of judicial consideration.

State of Arizona v. State of California, 283 U. S. 423 at p. 455;
State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U. S. 508 at p. 528.

Legislation regarding waters, both navigable and non-navigable, has often been challenged on the ground that the real purpose of it was something foreign to an expressed purpose of preserving or improving navigability, even though that latter purpose might incidentally be served. Attacks on that ground have uniformly been rejected, as in the following part of the decision in the Oklahoma case, to which we have several times referred.

> "Nor may we inquire into the motives of members of Congress who voted for this project in an endeavor to ascertain whether their concern over the great national loss from soil erosion, the enormous crop damages, the destruction of homes, the loss of life and other like ravages of floods overshadowed in their minds the desirability of protecting the Mississippi and other arteries of commerce. Arizona v. California, supra, 283 U. S., page 455, * * * and cases cited. It is sufficient for us that Congress has exercised its commerce power, though other purposes will also be served."
>
> *State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U. S. at p. 528.

In each of those cases a statute was attacked on the ground that purposes unrelated to protection or improvement of navigable waters constituted its real objectives and, therefore, that it was beyond the jurisdiction of Congress. Here, however, the Commission and its counsel

have taken the position that such purposes alone constitute a sufficient basis for exercise of the Congressional jurisdiction. This latter contention is as unsound as the other—and for the same reason: the constitutional objective of legislation regarding non-navigable streams is protection or improvement of the navigable waters into which they flow. Upon the issues presented here, other objectives are irrelevant.

The "jurisdiction" of Congress, referred to in Section 23 (b), is that defined in the cases first referred to under this Point I-A—*United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 703, 708, 709, and more recent decisions in which the Rio Grande case has been cited as authoritative, particularly the decision of this Court in *State of Oklahoma v. Guy F. Atkinson Co.*, 313 U. S. 508, 523—the jurisdiction to adopt measures with respect to non-navigable tributaries for the purpose of preserving or improving the navigable waters into which they flow.

I-B

The purpose thus indicated by the basic provision regarding the jurisdiction of Congress is confirmed by other terms of Section 23 (b).

1. **The first sentence** of Section 23 (b) prohibits unlicensed construction in *navigable* waters. As we have noted, that provision, which is similar to a provision of the River and Harbor Act of 1899 (30 Stat. 1151), was incorporated in Section 23 (b) by an amendment made in 1935; and by an amendment made at the same time, the provision regarding filing with the Commission a declaration of intention with respect to proposed construction in non-navigable tributaries of navigable waters was made mandatory instead of permissive (See account at p. 33).

Both the Senate and House Committees reported that the purpose of incorporating the requirement concerning construction in navigable waters in the same section with that requiring a declaration of intention with respect to construction in non-navigable tributaries was to "bring together in a single act" the requirements regarding construction of water power projects, so that anyone proposing to construct a project which might affect navigable waters would be under the duty of applying to the Commission.[8]

That expression by the two committees is one of several indications, in the legislative history of Section 23 (b), that the purpose of the part of the section in question here related to navigable waters as highways of interstate commerce. That history is dealt with more fully under Point I-C.

2. **Specific terms** used in Section 23 (b) are not only consistent with the intention we have discussed but, when read in the light of the basic provision regarding the "jurisdiction" of Congress, confirm it. In the following quotation from the section the specific terms to which we refer are in italics.

> "Any person, association, corporation, State or municipality intending *to construct a dam or other project works across, along, over, or in any stream or part thereof,* other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before *such construction* file declaration of such intention with the Commission, whereupon the Commission shall

[8] The texts of those reports are set out in Appendix D at pp. 100-101.

cause immediate investigation of such *proposed construction* to be made, and if upon investigation it shall find that the *interests of interstate or foreign commerce* would be affected by such *proposed construction* such person, association, corporation, State, or municipality shall not *construct, maintain, or operate* such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act."

[Sec. 23 (b), 49 Stat. 846, 16 U. S. C. 817.]

The emphasized terms indicate of themselves, we think, that the purpose of the provision relates to effects upon the waters.

The primary mandate is directed to anyone who proposes to "*construct*" a dam or other "*project works*", defined in Section 3 (12) as the "*physical structures*" of a project, "*across, along, over, or in*" any stream of the defined class. Obviously that terminology is appropriate, if the intention of Congress was to guard against effects upon non-navigable waters which might, in turn, affect navigable waters downstream. And it would seem to be utterly inept, if the purpose related to projects which, in operation, would generate electricity to be transmitted beyond the state.

The term "construction" is a significant one in that connection. As stated, construction of a dam or other physical structure, so located as to have an effect upon the water, is the subject of the section. And what the Commission is required to determine is whether or not the "proposed construction" will have the effect referred to in the statute. The draftsman of the provision evidently used the word "construction" with full appreciation of the meaning of the term. That is pointedly indicated by the latter part of the provision that if the Com-

mission should find that the "proposed construction" would have the defined effect, then the declarant shall not "*construct, maintain or operate*" the dam or other project works without a license.

Of course, the word "construction" should be read in the light of the purpose of the statute. We have no doubt that in determining the effect of the "proposed construction" the Commission should consider the nature of the thing to be constructed and the mode of its operation—with respect to effect of such operation upon the waters involved. But that factor contributes nothing to the Commission's side of this controversy. For the operation of the project will be exactly the same whether the electricity to be generated be consumed only in Missouri, the state of its origin, or be transmitted to another state for consumption there.

> It should be noted that, in the argument made in the brief by counsel for the Commission, the significance of the term "construction" is wholly unrecognized. In fact the term is not mentioned—except in quoting pertinent parts of the statute. Even in stating the question presented, counsel for the Commission, in their brief (at page 2), do not mention the "proposed construction" which constitutes the subject of the Commission's determination.

The word "interests" as used in the applicable provision of Section 23 (b) also is an important one. Considering that term in the light of all of the factors to which we have referred, it seems apparent that, while those are "interests of interstate or foreign commerce", they are interests related to the subject matter of the legislation—not the interests of interstate or foreign commerce in unrelated fields but the interests of interstate or foreign commerce to be affected by the "proposed construction" of structures, "across, along, over, or in any stream" of

the defined class. In short, the interests within the scope of Section 23 (b) are the interests of such commerce with respect to the waters with which the statute deals.

I-C

The Commission's present construction of the statute is contrary both to the Congressional intent shown by the legislative history and to the administrative interpretation followed by the Commission for many years.

1.

The Legislative History

In 1920, while the original act was under consideration there was a great deal of discussion of the effect of it as to both navigable and non-navigable streams.

The brief for the Commission refers (at page 24) to statements by "several members" of both Houses to the effect that the Congressional power over non-navigable tributaries was limited to protection of "downstream navigation or navigability"—citing, as examples, 56 Cong. Rec. 8917, 9038; 57 Cong. Rec. 4638-4639; 59 Cong. Rec. 6529-6531, 7723, 7725, 7730.

The most important of such statements, however, were the assurances, given by the advocates of the proposed legislation, that it did not provide for any greater control over non-navigable tributaries than belonged to Congress under the decisions of the Courts. And in connection with those assurances the *Rio Grande* case, which we have cited (at pages 36-37, 40), was referred to as correctly defining the power of Congress over non-navigable tributaries or "feeders" as they were sometimes called in the course of the discussion.

During the Senate debate Senator Nelson, a proponent of the bill, made the statements which we have set out, in context, as Appendix B (pp. 87, 88-89). We note here particularly the following part of his comments:

> "Mr. Nelson. * * * The Senator a few moments ago referred to the Rio Grande case. * * * What the court meant to say was that the Federal Government has sufficient jurisdiction over the feeders to see to it that the supply of water shall not be destroyed or so diminished in the feeders as to prevent the main stream from being navigable. * * * Except in those sections where the water is exhausted for irrigation, the erection of dams in feeders, as a matter of fact, for instance, in the East and in the Middle West, does not diminish the supply of water, for the water flows over the dam in one way or another and enters the feeders and then the main stream. It is only in the arid West where it is possible to divert water entirely for irrigation purposes from the main stream.
>
> "To what extent can that be done? I take it that if a case of that kind should come before the court, the court would consider both the rights of the farmers, who needed the water for irrigation, *and the interests of commerce requiring water for navigation,* and the question would be one of fact in each case. Does the diversion of the water of a certain feeder of a certain stream for irrigation purposes diminish the quantity of the water to such an extent as to destroy the navigability of the main stream? *If the diversion of the water did not diminish the navigability of the main stream, the Government would have no control whatever. Furthermore, it would only have control to the extent of the supply of water needed to subserve the purposes of real navigation.*
>
> "*We are not seeking to interfere with the present situation* * * *"(Emphasis added.)*
>
> (59 Cong. Rec. 7730.)

In 1935, while the bill for revision of the Act was before Congress, members of the Federal Power Commission and the Solicitor of the Commission were its sponsors and expositors. Pertinent parts of their statements are set out in Appendix C (beginning at page 91).

At hearings before the House Committee on Interstate and Foreign Commerce, after the Chairman of the Commission, Mr. McNinch, had tendered the assistance of himself and his associates, Commissioner Clyde L. Seavey made a statement to the Committee and filed two memoranda, one of which dealt with purposes and effects of the Federal Water Power Act (Appendix C at pp. 92-93).

The part of that memorandum dealing with Section 23 (b) of the Act (set out in Appendix C at p. 93), states the effect of the two principal amendments of that section—one of them making it mandatory instead of discretionary to file with the Commission a declaration of intention before construction in a *non-navigable* tributary of navigable water, the other bringing into that section the prohibition, in the River and Harbor Act of 1899, against unlicensed construction in any *navigable* water. Following the description of those two amendments of Section 23 (b) the memorandum says:

> "Under this section as amended, every person intending to construct a project which might conceivably affect any navigable waters would be under the duty of coming to the Commission. The act would be greatly strengthened by enabling the Commission to preserve control over all projects with which the Federal Government has any valid concern." (Appendix C, p. 93.)

That statement in the memorandum presented by Commissioner Seavey was accepted and relied on by the Senate and House Committees which reported on the bill. Each of them adopted, in substance, the language above quoted.

[The relevant parts of the Reports of the Senate Committee on Interstate Commerce and of the House Committee on Interstate and Foreign Commerce, respectively, are set out in Appendix D (at pages 99-101).]

Thus it was represented to both houses, upon the assurance given by a representative of the Federal Power Commission, that Section 23 (b) related to projects which might "*affect navigable waters*".

The Solicitor of the Commission, Dozier DeVane, made statements to the House Committee which, also, are pertinent with respect to the point at issue in this case. Those statements, in context, also are set out in Appendix C (at pages 94-98).

Of special significance are Mr. DeVane's statements to the effect

1. That the "jurisdiction" of Congress over non-navigable streams extends to "what might affect navigation" and that "those are the cases which fall under Section 23 of the Act" (Appendix C, at p. 94);

2. That the expression "effect upon interstate commerce" is synonymous with the effect upon navigability of a stream (Appendix C, at p. 95);

3. That none of the 1935 amendments was intended to "enlarge the jurisdiction of the Commission in the waters of the United States over which Congress has control" (Appendix C, at p. 96); and

4. That the jurisdiction of Congress over "non-navigable waters that affect navigation" was that defined in the case of *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690 (Appendix C, at p. 98).

The Court has had occasion to refer to the part taken by the Federal Power Commission and its aides in drafting and explaining the 1935 amendments. In reference to

the bill incorporating those amendments, it was said in a case decided in 1945:

> "As frequently is the case, this original bill was drafted by the counsel and aides of the agency concerned. In its support Commissioner Seavey of the Federal Power Commission said to the House Committee * * *"
>
> *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515 at p. 525.

If we may fill in that broken quotation with matter pertinent to the case now being considered—what Commissioner Seavey said to the House Committee (through the memorandum presented to that Committee) about the effect of the amended Section 23 (b) is what we have set out in Appendix C (at page 93), part of which we have quoted at page 50 of this Argument. The purport of that statement was that the amended section related to projects which would "affect any navigable waters" (Appendix C at p. 93).

That assurance—adopted and relied upon, as we have noted, in the Committee Reports of both houses—was buttressed by the statements of Commission Solicitor DeVane, to which we have referred. And it, no doubt, relieved the apprehensions of members of both Houses of Congress as to the extent of control to be exercised by the Federal Government over non-navigable streams.

In short, amended Section 23 (b), as explained by its Commission sponsors and accepted by the Congressional Committees, limited the licensing jurisdiction of the Commission to projects which would affect navigable waters. And that limitation—in the language of an observation made by the Court in the case to which we last referred—

> "* * * loomed importantly in the minds and speech of its sponsors, perhaps was necessary to get the bill

passed, and is one which the Commission must observe and the courts must enforce."

Connecticut Light & Power Co. v. Federal Power Commission, 324 U. S. 515 at p. 529.

2.

Prior Administrative Interpretation

The Commission's decision in this case says:

"This is the first time that the Commission itself has decided the issue, whether an effect on the interests of interstate commerce other than an effect on navigable capacity is sufficient to require the licensing of projects on non-navigable waters under the mandate of Section 23 (b).[1]" (R. 151.)

The footnote to that statement is this:

"[1] In *California Oregon Power Company*, 13 F. P. C. 1, 3, the Commission disagreed with the presiding examiner but did not state the basis for disagreement." (R. 151.)

The official report of the *California Oregon Power Company* case states the decision therein as follows:

"As stated above, the Examiner found that proposed Project No. 2082 will and the five existing projects are utilizing water for the generation of electric energy which in turn is transmitted in interstate commerce, and he concluded that in such way they affect the interests of interstate commerce, and are therefore subject to the licensing authority of the Commission. *We reject that conclusion as unwarranted under the Federal Power Act.*" (*Emphasis added.*)

(13 F.P.C. 1 at p. 3; 3 PUR 3d 207 at p. 210.)

That case (decided in 1954) is the only published decision of the Commission on that point prior to its decision in this case. But it appears from statements in the Annual Report of the Commission for 1962 that its administrative interpretation of Section 23(b) had been consistently in accord with its decision in the *California Oregon Power Company* case. Excerpts from that Report of the Commission are set out in Appendix E.

Under the heading "New Regulatory Policies", at page 23 of its 1962 Report, the Commission says that during that year it issued several "landmark decisions to clarify the scope of its jurisdiction". And it then referred to its decision in this case as

> "Among the more important opinions and other actions *establishing 'firsts' in policy* during the 1962 fiscal year * * *" (*Emphasis added.*)
>
> (See Appendix E, at p. 103.)

After discussing its holding—that the project would "affect the interests of interstate commerce since the power would be used to supply markets in Missouri and Illinois"—it said:

> "Past Commission findings with respect to hydroelectric projects not affecting Government lands or dams have been limited to determinations of whether the projects occupied navigable waters of the United States or affected their navigable capacity."
>
> (See Appendix E, at p. 104.)

That statement is not limited to any specific period. Presumably it applies to the practice followed since the Commission was created in 1920—more than forty years before its decision in this case. Thus the decision in this case represents a radical departure from the practice previously followed.

The court below treated the Commission's prior practice as a factor of importance. And it concluded that, since the administrative construction by the Commission was presumably known to Congress, which had made no change in the statute in that respect, the administrative construction had acquired the force of law (R. 295-296; 326 F. 2d at p. 552). In support of its conclusion the Court cited *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 114-115.

Perhaps it may be questioned that the administrative interpretation evidenced by the Commission's long-followed practice was known to Congress. But we think that the conclusion (that it was known) is sound. The fact that the practice had been followed for many years and the fact that the decision in the *California Oregon Power Company* case (in 1954) was set out in the official reports of the Commission (as well as in the unofficial Public Utility Reports) are perhaps sufficient in that respect. But of even greater importance is the fact that in 1935, when the Commission was sponsoring the amendments adopted in that year, it was clearly indicated—in the memorandum presented by Commissioner Seavey and in the statements made by Commission Solicitor DeVane—that Section 23 (b) as amended related to projects which would "affect navigable waters" and that the "interests of interstate or foreign commerce" referred to in the statute were interests with respect to navigation and navigability. (See Appendix C at pp. 93-95, 98 and discussion, ante, at pp. 50-52 of this Argument.)

However, we regard the prior administrative interpretation as a factor of importance, whether or not it may be treated as having the force of law under the doctrine of *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 114-115.

I-D

The argument for the Commission is based upon the mistaken assumption that, in Section 23 (b), Congress exercised its jurisdiction over interstate commerce generally rather than its jurisdiction over waters as media of such commerce.

The primary part of the argument made (at pages 13-20 of the brief) is directed to the proposition that the project will "affect interstate commerce". Its general premise is that

> "* * * when [Congress] wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect', 'interrupt', or 'promote' interstate commerce." Citing *Polish Nat. Alliance v. National Labor Relations Board*, 322 U. S. 643, 647.
>
> (Brief for F. P. C., page 16.)

We do not question—and we have never questioned—the soundness of that proposition. But it has no application here. What Congress has provided against in Section 23 (b) is not what will "affect interstate or foreign commerce" generally but what will affect the interests of such commerce with respect to the subject matter of the provision in question: tributaries of navigable waters and the Congressional "jurisdiction" over them under the Commerce Clause.

The argument purports to deal with the "letter and purpose" of the provision (Brief for F. P. C., p. 14). But it not only disregards important parts of the context, which show the purpose of the provision, but also disregards an important element of the "letter" itself. The key word "interests" is mentioned only casually in the

course of the discussion (at pp. 13-20) and in the rationale of the argument is utterly disregarded.[9]

What the argument comes to is that *generation* of electricity to be transmitted in interstate commerce will "affect" such commerce and therefore may be regulated, within proper limits, by federal legislation. There is no doubt of that proposition. Nor is there any doubt that it is irrelevant to the question here presented. Congress might have exercised its general power over interstate commerce by giving the Federal Power Commission jurisdiction over all plants generating electricity—whether by water power or other power—for transmission in interstate commerce, as stated in the brief for the Commission (at page 15). Buf it has not done so. In Part II of the Act which deals with interstate transmission and sale of electricity and gives jurisdiction to the Commission over facilities used for those purposes, Congress expressly withheld from the Commission jurisdiction over facilities used for "the generation of electric energy", except as otherwise specifically provided in that Part and in Part III [Section 201 (b), 49 Stat. 847, 16 U. S. C. 824].

We do not mean to imply that the provision (in Part II), excluding generating facilities from jurisdiction of the Commission, governs the question presented in this case. We include the foregoing comments here only because of the points made by counsel for the Commission to which we have just referred.

Getting back to the main theme of the argument by counsel for the Commission, the cases upon which they

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[9] At page 17 of the brief, in footnote 10, counsel say that they use the word "commerce" in their argument as a short term for the statutory phrase, "interests of interstate or foreign commerce". But it is evident that the word "interests" would be inappropriate in the text of the argument they make and in relation to the cases upon which they rely.

rely are those demonstrating that local or intrastate activities may be within the regulatory power of Congress to the extent that they affect interstate commerce (Brief for F. P. C., pp. 15-19). Most of those cases involved the question of whether particular local operations (production of steel, manufacture of goods, generation of electric energy et cetera), though intrastate of themselves, were subject to federal regulation as affecting interstate commerce.

But none of those cases reaches the question presented here. For the statute there involved—the National Labor Relations Act (49 Stat. 449; 29 U. S. C. 151, et seq.)—constituted an exercise of the power of Congress over interstate commerce generally. The breadth of the Congressional exercise of power in the Labor Act, and the distinction in that respect between those cases and a case like that before the Court here, are indicated in the first of the decisions relied upon: *Polish Nat. Alliance v. National Labor Relations Board*, 322 U. S. 643. In that case the Court, referring to the National Labor Relations Act, said:

> "By that Act, Congress in order to protect interstate commerce from adverse effects of labor disputes has undertaken to regulate all conduct having such consequences that constitutionally it can regulate."
>
> 322 U. S. 643 at p. 647.

And in that connection the Court made an observation which is pertinent here:

> "Constitutional questions that look alike often are altogether different and call for different answers because they bring into play different provisions of the Constitution, *or different exertions of power under it.*" (*Emphasis added.*)
>
> 322 U. S. at p. 649.

The statute with which we are concerned [Section 23 (b) of the Federal Power Act] represents, we repeat, an exercise of the Congressional power *over waters* within its jurisdiction under the commerce power, not an exercise of power over interstate commerce *generally*. Of course, all of the power exercised in the Act is derived from the power to regulate interstate and foreign commerce, from the power to administer public lands and reservations and, in some instances, from power under treaties. But, as stated in one of the cases relied upon by counsel for the Commission,

> "These sources of constitutional authority are all applied in the Federal Power Act to the development of the navigable waters of the United States."
>
> *First Iowa Hydro-Electric Coop. v. Federal Power Com'n*, 328 U. S. 152 at p. 171.

In a case decided many years before that one (in 1925) the Court similarly appraised the objective of the statute.

> "Some provisions relate particularly to the development of power, some only to improvement of navigation, and others to both, but all taken together suggest, if they do not show, that conservation for the purposes of navigation is a leading object."
>
> *State of New Jersey v. Sargent*, 269 U. S. 328 at p. 336.

In a very recent case, *Federal Power Commission v. Southern California Edison Co.*, 376 U. S. 205, 218-219, the Court referred to Section 20 of the Federal Power Act (41 Stat. 1073; 16 U. S. C. 813) giving the Commission power to regulate rates in certain circumstances. And the Court described as follows the nature of the power thus conferred:

> "We think the power given the Secretary under § 6 of the Boulder Canyon Project Act is similar

in scope to the Power of the FPC under § 20 of the 1920 Water Power Act. Under the Water Power Act the principal function of the FPC, then composed of the Secretaries of War, Interior, and Agriculture, was the licensing, construction and operation of hydroelectric development projects. *Its power to regulate rates was based upon the national power over navigable waters and public lands, and not upon power over interstate commerce. It was exercised only as an incident of the licensing power,* and then only to fill a hiatus which might otherwise exist in the absence of state regulation." (*Emphasis added.*)

Federal Power Com'n v. Southern Cal. Edison Co., 376 U. S. 205 at p. 218.

So we come back to the proposition dealt with under Point I-A (ante, at p. 35)—that the jurisdiction exercised by Congress, under Section 23 (b), over non-navigable streams is jurisdiction related to preservation or improvement of the navigable waters into which they flow. And the meaning of the provision in question is to be determined accordingly. The argument of counsel for the Commission and the cases relied upon in connection with their argument are extraneous to the question presented.

I-E

The statute, as interpreted by the Commission, would produce absurd results.

The Court of Appeals pointed out several of the anomalous consequences attending the Commission's interpretation.

One was suggested in the question of what the status of the project would be if it should be decided—either before completion of the project or after an initial period of operation—to confine the transmission of electric energy

to points within the state (R. 294; 326 F. 2d 535 at p. 551). In that event—on the Commission's interpretation of the statute—the basis of its jurisdiction would cease to exist. But the license issued in the meantime—with all of its burdensome conditions (see summary in Appendix A at pp. 84-86)—would remain in effect. For there is no provision of the statute which authorizes cancellation of a license in such a case. And there is a provision that a license may be surrendered *"only upon mutual agreement between the licensee and the Commission"* (Sec. 6, 49 Stat. 841; 16 U. S. C. 799).[10]

Another factor referred to in the opinion of the Court of Appeals is that steam plants, generating electricity for transmission in interstate commerce, admittedly are not under the licensing jurisdiction of the Commission; and the Court observed in that connection

> "In the light of the fact that the generation of electrical energy is a local or intra-state activity, we fail to see any difference between a generation of such energy by hydroelectric projects on non-navigable streams and the generation of such energy by steam plants that would support the doctrine now announced by the Federal Power Commission that the mere transmission of electrical energy in interstate lines in and of itself would give it jurisdiction to license the generating project."
>
> (R. 293; 326 F. 2d 535 at p. 551.)

That observation by the Court of Appeals is attacked in the brief for the Commission (at pages 29-30). There

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[10] There is also a provision that upon or after "expiration of any license" the United States shall have the right to take over, maintain and operate the licensed project (Sec. 14, 49 Stat. 844, 16 U. S. C. 807). It may be that that provision would not apply in the event of surrender of the license by mutual agreement between the licensee and the Commission; but that is not free of question.

counsel for the Commission say that "utilization" of the water resources of the nation is the important factor and that

> "* * * the distinction between a hydroelectric project, which uses the power of falling water to drive turbines and thereby generate energy, and a steam (or atomic) plant is obvious."
>
> (Brief for F.P.C. at p. 30.)

But generating plants operated by steam power also utilize the water resources of the nation. For that reason they are usually located along or adjacent to streams or other natural bodies of water. The Record does not show the manner in which steam plants use the water in their operation. But the fact of such use is a matter of common knowledge, and is referred to in the published Forty-second Annual Report of the Federal Power Commission for the year ended June 30, 1962, excerpts from which are set out in Appendix E to this brief (at pages 102-103).

In that report the Commission recommended to Congress that the Federal Power Act be amended to provide for licensing by the Commission of steam generating plants to be erected "in or abutting the navigable waters of the United States for the diversion of water for use" in such a plant. And in explanation of its recommendation it said that such steam plants had been built

> "* * * adjacent to navigable waters of the United States with diversion facilities in, across or along the stream to provide water for cooling purposes."
>
> (Forty-second Annual Report, Federal Power Commission, for year ended June 30, 1962, at pp. 12-13—and see Appendix E to this brief, at pp. 102-103.)

So, what is asserted by counsel for the Commission (at pages 29-30 of their brief) is not consistent with the pub-

lished statement of the Commission itself or with facts of common knowledge as to "utilization" by steam plants of "water resources of the nation".[11]

The distinction made in that respect, in justification of the Commission's interpretation of the statute, will not bear close inspection from another viewpoint. Suppose, for example, two precisely similar hydroelectric generating plants on non-navigable tributaries of navigable water —neither of them affecting downstream navigability but one transmitting energy in interstate commerce, the other transmitting only within the state. Both utilize the water of the stream and both, in the language of counsel for the Commission, use "the power of falling water to drive turbines and thereby generate energy". Yet, under the Commission's theory, the one from which energy is transmitted in interstate commerce is within its licensing jurisdiction, and the other one is not. Why? Obviously not because of any difference in the use of the water resources. The plants are indistinguishable in that respect. The only distinction is that with respect to the interstate transmission in one case in contrast with the purely local distribution in the other.

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[11] Under the Commission's interpretation of Section 23 (b) of the Act, it would seem that a steam plant, located "along or in" navigable water or a non-navigable tributary and *transmitting energy in interstate commerce*, would be subject to the licensing requirement of that section. But concededly such a plant is not subject to that requirement. The reason is, as counsel for the Commission point out in their brief (at pages 15 and 30), that the provisions of Part I of the Federal Power Act, *and its "title"*, show that the licensing provisions were intended to apply only to "water power" projects.

We agree with that reasoning—which demonstrates equally, we think, that the licensing requirement as to a project on a non-navigable stream applies only where downstream navigability will be affected. For not only does the title of the Act (quoted ante, at p. 30) refer to "navigation" as well as to "water power", but the purpose of protecting and improving navigability is clearly disclosed in the provisions of the statute, as we have sought to demonstrate under previous points.

In view of those factors, as well as of the other factors with which we have dealt in prior points, the Commission's interpretation is an untenable one. The Court of Appeals properly rejected it.

II.

The contention that the Court of Appeals erred in rejecting the Commission's finding that the project would affect the navigable capacity of the Black River, not having been asserted as a ground of the petition for certiorari, is beyond the scope of review under Rule 40 (1) (d) (2) of this Court.

And the contention, considered on its merits, is not maintainable.

II-A

The Rule and Its Application.

We recognize, of course, that whether or not the contention should be considered is within the Court's discretion, despite petitioner's deviation from the applicable rule—as we understand it. But we call attention to the pertinent facts.

The rule directly involved is No. 40(1) (d), relating to briefs of an appellant or petitioner on the merits. And certain provisions of Rule 23(1) (c) and (e) relating to the content of a petition for certiorari, also are relevant. The pertinent parts of both rules are set out in the margin.[12]

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[12] *Rule 23* provides, in part:

1. The petition for writ of certiorari shall contain in the order here indicated—

* * * * * * *

(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The

The part of Rule 40 involved here is the provision [in paragraph (1) (d)(2)] that, while the phrasing of the questions presented (in a brief on the merits) need not be identical with that set forth "in the jurisdictional statement or the petition for certiorari", the brief "may not raise additional questions or change the substance of the questions already presented in those documents".

In this case the Commission's petition for certiorari, under the heading "Question Presented" (at p. 2), stated a single question—the question it has argued as its first point here. In a footnote however (at p. 2 of the petition) petitioner referred to a "separate question" as involved in the case—stating that question (in the footnote) as it is stated, under "Questions Presented", in its brief on the merits here (at p. 2)—and, referring to that question said:

"Although we do not urge that this issue, standing alone, would warrant grant of the writ, we reserve the

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statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. *Only the questions set forth in the petition or fairly comprised therein will be considered by the court* (emphasis added).

* * * * * * * *

(e) A concise statement of the case containing the facts material to the consideration of the questions presented.

Rule 40 provides, in part:

1. Briefs of an appellant or petitioner on the merits shall be printed as prescribed in Rule 39, and shall contain in the order here indicated—

* * * * * * * *

(d) (1) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, *but the brief may not raise additional questions or change the substance of the questions already presented in those documents.* Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented (*Emphasis added*).

> right, in the event that certiorari is granted, to argue the question as an alternative ground for reversing the judgment below."
>
> (Petition, p. 2, fn 1).

Is that incidental statement and reservation (in a footnote of the petition) sufficient to constitute compliance with the rules?[13]

It is evident that the question stated in the footnote was not a question "presented" within the meaning of Rule 23 (1) (c), limiting consideration of a petition for certiorari to questions therein presented. Indeed the footnote itself states that the question referred to was not being presented as ground for granting a writ of certiorari. And there was no statement in the petition—such as required by subparagraph (e) of the same rule—of the "facts material" to the question incidentally referred to in the footnote.

The question is whether the footnote statement constitutes a sufficient basis upon which to present now the question with respect to navigability—in view of the provision of Rule 40 (1) (d) (2) that only "questions already presented" in the petition for certiorari may be raised in the brief on the merits.

Having regard to what we take to be the spirit and reason of the rule, we think that that question must be answered in the negative. But we have found no decision which may be considered precisely in point on the facts,

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[13] It is of interest, at least, and perhaps of importance that, in its petition for rehearing and reconsideration of the decision of the Court of Appeals, the Commission said that it was "reserving" its objection to the court's decision with respect to the effect on navigability of the Black River but was requesting "*only*" a rehearing and reconsideration of the ruling by which the court rejected the Commission's finding that the project would affect the interests of interstate commerce "entirely apart from its effect on navigability". (See 2d paragraph of petition for rehearing, R. 299.)

although there is one in which the factual elements are, we think, essentially similar.

That is the case of *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 177-178. There the brief on the merits presented two questions in addition to the three which had been presented in the petition for certiorari. But the petition had been accompanied by a supporting brief, and that brief contained "specifications of error" relating to decisions of the other two questions. Thus the two "additional questions" presented in the brief on the merits were, as the Court said, reflected by the specification of errors in the brief supporting the petition.

The Court declined to consider those two additional questions—applying its rule so as to limit the brief on the merits "to the questions specifically brought forward by the petition." (304 U. S. at p. 177.)

In *Helis v. Ward et al.*, 308 U. S. 365, 370, in which the Court declined to consider a question not presented in the petition for certiorari, the rule followed was thus stated:

> "It is well settled that this Court confines itself to the ground upon which the writ was asked or granted, the review here being no broader than that sought by the petitioner."
>
> (308 U. S. at p. 370.)

That statement of the rule is in precise accord with what we understand to be its reason and its purpose. If so, the second question presented by petitioner in its brief on the merits is outside the scope of the review to which it is entitled. For, as petitioner stated in the footnote comment (p. 2 of its petition), that question was not presented as ground for granting the writ and was concededly insufficient to constitute such ground.

In *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 357, (fn. 2), the decision was expressed in this language:

> "Petitioner's brief assails the Board's order on numerous *grounds* not set up in his petition for certiorari. We limit our review to the question *specifically raised* in the petition." (*Emphasis ours.*)

And see:

J. I. Case Co. v. Borak, 377 U. S. 426, 428-429;
Local 1976, etc. v. National Labor Relations Board, 357 U. S. 93, 96.

In addition to the foregoing considerations, it should be noted that the additional question which the Commission seeks to have the Court decide is a factual one. What the court below decided was that there was no substantial evidence to support the Commission's finding that the navigability of the Black River would be affected. In the Statement of this brief (at pp. 3-4) we have stated the premises of the court's ruling and in subsequent parts of the Statement have summarized the facts upon which those premises were based. We refer again to the parts of the court's decision relating to the possibility of effect on navigability (R. 285-288, 296-297; 326 F. 2d 535 at pp. 546-548, 553).

In case this Court should decide, notwithstanding the foregoing factors, to consider the question referred to, we submit the following points of argument upon that question.

II-B

The argument for the Commission is directed to a false issue.

The points of the argument are accurately summarized at pages 10-11 of the brief for the Commission, as follows:

"However, the undisputed evidence shows that, under conditions of river flow which have actually been experienced in the past, the Taum Sauk project could materially affect the level of the Black River if the project were called upon to meet emergency needs for additional electric energy or in the event of malfunction or improper operation of the facilities. The court below deemed it a sufficient answer that, if it later develops that navigability is impaired or threatened, the Commission might then intervene. We submit, however, that the Commission is not constrained to wait until the adverse potentialities of the project have already materialized, but may take steps to forestall them."

(Brief for F. P. C. at pp. 10-11.)

At pages 33-35 of the brief those points are repeated with some details but with no change either in the stated factual premises or in the stated effect and ground of the decision by the Court of Appeals.

But the statements made as to each of those two matters are inaccurate and without support in the record.

As to the facts, the Record does not show that the project could materially affect the level of the Black River if it "were called upon to meet emergency needs for additional electric energy." Neither does it show that such an effect would occur "in the event of malfunction **or** improper operation of the facilities." What it does show is that, in the event of the *simultaneous* occurrence of a number of stated conditions, including the abnormal condition of a full upper pool and a full lower pool at the same time *and the operation of the turbines in a full generating cycle under those and other conditions specified in the Stipulation,* the stage and flow of the water would be increased (to specified extents) both in the nonnavigable East Fork and in the Black River. The circum-

stances which would have to occur simultaneously in order to produce those effects are stated at pages 75-78 of the Record, in the Stipulation (R. 64-79), offered and received in evidence (R. 51-52, 103, Item L), upon which the case was submitted to the Commission (R. 51-52).

In that connection it should be noted that the hypothetical conditions, stated as those which *"must be assumed"* in order to produce the maximum effects on downstream stage and flow, make no reference to the element, on which counsel for the Commission lays stress here—that is the element of the project being "called upon to meet emergency needs for additional electric energy" (Br. for FPC, pp. 11 and 34). The notion which counsel for the Commission have with respect to that matter seems to be actuated by their impression that the Taum Sauk generators would be kept "rotating in synchronism" with other generating units in the system, thus providing a "spinning reserve" without feeding energy into the system but primed to do so immediately in the event of an outage anywhere in the system (Brief at page 19). That impression is erroneous, as we have pointed out in the statement of this brief (at pp. 18-19, fn. 5).

We deal with the facts in more detail under our next point—II-C. But those stated here are sufficient, we trust, to show that the factual premises of the argument made by counsel for the Commission under their Point II as to "effect on the navigability of the Black River" are unsound.

As to the decision of the court below, what the argument assumes is equally erroneous. It assumes—as we have indicated by the quotation from pages 10-11 of the brief for the Commission—that the decision was based on the fact that a future impairment or threat of impairment of the navigability of the Black River might be met by Commission intervention at that time (Br. pp. 10-11), such

intervention being within the authority of the Commission under Section 4 (g) of the Act (Brief, pages 34-35).

In fact, that was not the basis of the court's decision. On the contrary, the decision was based upon the lack of substantial evidence to support the Commission's finding of effect on navigability, and in that connection it was demonstrated that the conclusions reached by the Commission Examiner (which the Commission itself adopted) were based upon improper speculation and left out of account important factors demonstrating the contrary (R. 285, 288; 326 F. 2d 535 at pp. 546, 548).[14]

What the court said about the authority of the Commission to take action under Section 4 (g) of the Act was directed to the point that the decision would not bar effective action by the Commission in the event of any future development impairing, or threatening to impair, navigability of the Black River (R. 297-298; 326 F. 2d at pp. 553-554).

But counsel for the Commission, taking that comment by the court as their target, direct their entire argument under their Point II to the proposition that the authority of Congress—and of the Commission—extends to "preventive regulation"—which, of course, is intended to avert what would be injurious to the interest being protected and not merely to correct or alleviate the consequence of an injury which has already occurred.

That obvious proposition needs no demonstration. The discussion which counsel have devoted to it and the cases they have cited in support of it are superfluous.

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[14] In the Statement of this brief we have indicated what the court actually held concerning the possibility of effect upon Black River navigability and the factors upon which its conclusion was predicated (*ante* pp. 3-4). In the next point of this brief (II-C) we deal more specifically with the elements sustaining the court's conclusions.

In short, as we indicated at the outset of this topic, the whole argument on behalf of the Commission with respect to the decision of the court below in rejecting the Commission's finding upon effect of Black River navigability is directed to a false issue. There is no such issue in this case.

For that reason it would be logical—and, we think, justifiable—to terminate our discussion of Commission's Point II at this point. But, rather than rely upon what might be regarded as a merely technical limitation, we undertake to deal under the next point with the considerations demonstrating the validity of the conclusion reached by the Court of Appeals and the invalidity of the finding by the Commission, which that court rejected.

II-C

There was no substantial evidence before the Commission to support a conclusion that construction and operation of the project would substantially affect the navigability of the Black River.

The controlling facts are beyond dispute. They are stated in the Stipulation (R. 69, 51-52, 103, Item L) and the exhibits incorporated in it. The only question is whether or not those facts are sufficient to support a conclusion that the construction and operation of the project works would substantially affect the navigable capacity of the Black River.

The Black River—Navigable Capacity. To answer that question, it is necessary to consider first to what extent the Black River is navigable—as shown by the stipulated facts. And it is to be borne in mind, of course, that the navigation with which we are concerned is navigation "in commerce". For the governing provisions of Section 23 (b) of the statute are based upon the constitutional

power of Congress to regulate commerce with foreign nations and among the several states.

All of the evidence of navigation on the Black River is set out in division V, captioned "Navigation", of the Stipulation (R. 72) and is summarized under the same caption in the Statement of this brief (at pp. 8-10). It shows, as a matter of history, that ties and timber have been floated down the river and that, according to a determination by the Corps of Engineers in studies that preceded construction of Clearwater Dam (which was completed in 1951—R. 73), the head of navigation for that purpose was at or near the mouth of the East Fork (R. 73).

The Stipulation refers also to a book, published in 1937, in which the author describes a float trip on the Black River in a flat bottomed boat, 28 feet long and 2½ feet wide (R. 73). The obvious implication of what is stated in the Stipulation is that the "float trip" was not "in commerce". And, incidentally, the depth of water necessary to float a flat bottomed craft of that sort would be little if any greater than that necessary for floating ties and timber.

So what we have to consider here is a stream which is navigable in commerce for the purpose of floating ties and timber. And the question is whether there is sufficient evidentiary basis for a conclusion that the operation and construction of the Taum Sauk Project would substantially affect the navigable capacity of the stream for that purpose.

Evidence as to Effect on Navigability. The only direct evidence upon that question is that the construction and operation of the project would have *no appreciable effect* upon navigation on the Black River. That evidence is in a letter from the Office of the Chief of Engineers of the United States Army, addressed to the Chairman of the

Federal Power Commission, in response to an inquiry made by the Commission. The letter is in the Record as Exhibit 10 (R. 228, 102) and is referred to and incorporated in the Stipulation [R. 66, paragraph (10)]. In that letter, which is signed by Colonel Robert M. Tarbox, it is said:

> "The proposed dam would be located approximately 15 miles upstream from the upper limit of the Corps of Engineers' Clearwater Reservoir project and about 85 miles above the head of an authorized navigation project (inactive) on the Black River. *Construction and operation of the applicant's project would have no appreciable effect on the Clearwater Reservoir project or navigation on the Black River.*
>
> "The plans of the structures are satisfactory insofar as the interests of navigation are concerned. * * *" (*Emphasis ours.*)
>
> (Exhibit 10, R. 228, 102.)

That opinion is not mentioned in the decision of the Commission Examiner (R. 79), which was adopted by the Commission (R. 143, 154-155). Thus the Commission decision disregarded the only evidence in the case going directly to the question of effect upon navigability. Instead, the conclusions expressed in the decision relate entirely to changes in stage and flow under certain conditions. And it is apparent in the decision that such changes in stage and flow are treated as the equivalent of changes in navigable capacity. That assumption, as we note a little later, constitutes one of the flaws in the conclusion reached.

Evidence as to Changes in Stage and Flow. The maximum possible changes (attributable to operation of the project) in the stage and flow of the Black River are those stated in division VI of the Stipulation—at pages 74-78 of the Record. And, as the Stipulation says: "To present the situation which would result" in those changes "it must be assumed" that all of the hypothetical condi-

tions listed in that connection would occur "simultaneously" (R. 76).

In the Statement of this brief, under the caption "Abnormal Conditions—Possible Effects" (at p. 14) and the caption "1949 Flood" (at p. 17) we have summarized the statements made in the Stipulation with respect to this matter and have referred (at p. 16) to certain of the mistaken statements in the brief for the Commission which relate to the same matter. To avoid repetition we refer to the summarization in those prior parts of this brief. But we call attention here to certain of the ultimate factors involved.[15]

The peak increase in the flow of the Black River at the Annapolis gage (eleven miles below the mouth of the East Fork, R. 70) would be 3,600 cubic feet per second (cfs), which would be reached after an eight-hour generating cycle at a time when the lower pool was full; and, thereafter, the flow would subside gradually to a natural flow of 582 cfs (R. 76-77). The maximum changes in stage in the Black River at the Annapolis gage would range from an increase of 3.4 feet to a decrease of 0.35 feet. The former might occur, if a generating cycle were begun with the lower pool already full and under the other conditions hypothesized in the Stipulation (R. 76-77).

Under those hypothetical conditions, the rise of 3.4 feet would occur at a maximum rate of 0.6 feet per hour, the peak being reached 14½ hours after the beginning of the generating cycle (R. 76-77). The latter change—that is the decrease of 0.35 feet in the stage at Annapolis—would occur under conditions stated in Exhibit 7B (R. 207, 101, 102), which deals with a hypothetical generating cycle "on top of" a flood such as that experienced in 1949. If

[15] In that connection it should be borne in mind that only the Black River has navigable capacity. The East Fork is concededly non-navigable.

such a generating cycle were completed "on top of" the flood waters and were followed immediately by a pumping operation, the stage of the Black River at the Annapolis gage would be reduced by 0.35 feet about 8½ hours after the beginning of the pumping cycle (R. 77-78).

After either such an increase or such a decrease in stage, the stream would gradually return to its normal stage (R. 76-77). And the Stipulation states with respect to all such changes:

> "* * * On numerous occasions, natural conditions have caused both greater rates of rise and greater increases in stage in equal periods of time" (R. 77).

The Commission's Speculative Conclusions. The Stipulation does not indicate that the hypothetical conditions therein referred to are likely to occur—or even that they are within the range of what may reasonably be anticipated. It only enumerates the hypothetical conditions, occurring simultaneously, which "*must be assumed*", as prerequisite of such changes. The fact that these conditions are enumerated in a stipulation does not make them any less hypothetical and does not prevent them from being properly regarded as speculative. Indeed, it is apparent on the face of the statements as to certain of the conditions, that the possibility of occurrence is so remote as to exclude them from a reasonable appraisal of the possible effects of operation.

The Commission Examiner not only assumed malfunction but also that inspection, maintenance and repair "could require the emptying of either or both of the pools involved" (R. 91).

There is nothing in the Record to support that assumption by the Examiner, and slight consideration is sufficient to show that it could not be true. While the Record does not show the provision made for maintenance or repair work about the sluices or the upstream face of the

dam, it is common knowledge that such provisions are made in dams across flowing streams. Otherwise it would be impossible to do the work of maintenance or repair. To empty the reservoir created by a dam in a flowing river, it would be necessary to stop the flow of the river.

There are other respects in which certain of the hypothetical conditions enumerated in the Stipulation may be shown to be beyond the realm of reasonable anticipation. We think it unnecessary to go into them—for several reasons which will appear in the discussion which follows. But we invite attention to certain of the conclusions of the Court of Appeals on that phase of the case. They may be epitomized as follows:

1. Even under all of the abnormal conditions hypothesized in the Stipulation and in the Examiner's decision, there would be no change in the natural flow of water in the East Fork and thence into the Black River, unless a generating cycle were then begun (R. 287; 326 F. 2d 535 at p. 547).[16]

2. In the language of the opinion—

> "The lengthy and complete Report of the presiding examiner, which is adopted by the Com-

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[16] In that connection it is important to recall that a generating cycle does not begin automatically—the generators of the Taum Sauk Plant not being kept in operation as a "spinning reserve"—as counsel for the Commission mistakenly state in their brief (at page 19).

As stated in the Declaration of Intention (which was incorporated in the Stipulation—R. 65, 100, 102)

> "Declarant intends to maintain, as a normal condition, a full upper pool and a minimum level in the lower pool except when the plant is pumping or generating. Water that is transferred from the upper pool to the lower pool during a period of generation will be returned to the upper pool during a later period to restore the normal condition of the full upper pool. For the pumping process, Declarant will use electric capacity available to it from its own and interconnected systems. No operation other than the above described daily cycle is contemplated." (R. 20-21.)

mission in its order, stresses hypothetical situations which could only be reasonably hypothesized during a period when the flow in the East Fork would exceed 2,800 cubic feet per second. Based on an 18-year record of flows, the flow at the damsite would not exceed 2,000 cubic feet per second 99½ per cent of the time and has only exceeded 7,000 cubic feet per second on three occasions during that period. The sluice gates are capable of discharging 2,800 cubic feet per second so that, absent any malfunctioning of the sluice gates, we are here dealing with an analysis of what might happen less than one-half of 1 per cent of the time. To find an effect upon navigability, the examiner and the Commission then must hypothesize various malfunctions of the project during this less than ½ of 1 per cent of the time where either certain flood conditions or high flow conditions would prevail." (R. 287; 326 F. 2d at pp. 547-548.)

3. Even if all of the hypothesized conditions should occur, the resulting changes in stage and flow of the Black River would be unimportant. For—

> "On numerous occasions, natural conditions have caused both greater rates of rise and greater increases in stage in equal periods of time." (R. 287; 326 F. 2d at p. 547.)

In view of all of those factors, the court held the Commission's finding of effect upon navigability was not supported by substantial evidence (R. 288, 297; 326 F. 2d 535 at pp. 548, 553).

Effect on Navigability. Basing its decision upon the conclusions we have summarized, the Court of Appeals did not reach another proposition which we presented—

and regard as important, although not essential in view of the speculative character of the Commission's findings. The additional proposition is the simple one that changes in stage and flow of the stream do not necessarily show any change in its navigable capacity. They may or may not affect navigability. In this case there is no evidence that they would. On the contrary, there is positive evidence—in the letter to the Chairman of the Commission from the Office of the Chief of Engineers—that the construction and operation of the Taum Sauk Project will "have no appreciable effect" upon navigation in the Black River (Exhibit 10, R. 228, 102).

The legal test, of course, whether or not there would be *substantial* effect on navigability. As stated in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 709,.

> "The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact."
>
> 174 U. S. 690 at p. 709.

As we have stated the Commission in its opinion did not go into this matter; but it adopted (R. 154-155) the decision of the Examiner (R. 79-100). And it is apparent in the Examiner's decision that he regarded changes in stage and flow of the river as changes in its navigable capacity. While he referred to effect on navigability at a number of places in his opinion, the context indicates that he was speaking of effect upon the stage and flow of the water; and at one point in his decision he expressed that concept in unmistakable terms as follows:

> "Accordingly, it is clear that where dams are proposed to be constructed even on a non-navigable stream, which are capable in their ordinary opera-

> tion of *affecting measurably the flow of water* at a lower point of the river which is navigable the law is that the Commission's jurisdiction attaches and the licensing provisions are applicable." (*Emphasis added*) (R. 87).

The navigable capacity of the stream with which we are concerned—the Black River—is very limited, as the Stipulation shows (see Statement of this brief under the caption "V. Navigation"—ante, at p. 8). The only commercial navigation on the stream of which there is any record has been in floating ties and timber; and there is no basis in the Record upon which to conclude that, even if the maximum changes in stage and flow should occur, the capacity of the stream for floating ties and timber would be substantially affected. That factor adds emphasis to the positive opinion, obtained by the Commission from the Corps of Engineers, that the construction and operation of the project "would have no appreciable effect" on the Clearwater Reservoir project or navigation on the Black River." (Exhibit 10, R. 228, 102.)

II-D.

As to Certain Argument Extraneous to the Issues.

At pages 36-37 of their brief counsel for the Commission list a number of particulars in which the Commission would be able to exercise continuing supervision if a license for the project were required. While their discussion of those particulars is irrelevant to the issues in this case, we wish to refer to several of their contentions which, perhaps, should not be permitted to go unchallenged.

1. First they refer to the power of the Commission, through licensing, to impose conditions as to design of a project—mentioning in that connection several catas-

trophes, which have recently been in the news, caused by the breaking of a dam (Brief, page 36).

We assume that they do not intend to imply by these comments that there is any fault in the design of the project involved here. If there were any design defect, it would no doubt have been brought to attention by the engineers on the Commission Staff or in the course of the detailed examination which was given to the case by its attorneys. Moreover, the opinion obtained by the Commission from the Office of the Chief of the Corps of Engineers, to which we have several times referred, not only contains no suggestion of any defect in design but states:

> "The plans of the structures are satisfactory insofar as the interests of navigation are concerned."
>
> (Exhibit 10, R. 228, 102.)

There is nothing in the Record to indicate that the design of the dam involved any unusual feature or presented any engineering difficulty. It is a simple concrete dam in a very small stream.

2. It is clearly implied in the brief for the Commission that, without a license, there would be no assurance that the project would be "constructed, operated and maintained" as proposed—and without future alteration (Brief, pp. 36-37, 38). That implication is without basis. For, in the first place, the Declaration of Intention, which Union Electric Company was required to file under Section 23 (b) of the Act, obviously covers only the project therein described. Any substantial change in it would require a new declaration of intention and a new investigation by the Commission—under the plain requirements of that section of the Act. In the second place, any future occurrence or condition threatening to impair the interests of navigation would be within the Commission's powers of investigation and remedial order under Section 4 (g) of the Act.

That part of the statute is set out in Appendix A to the brief for the Commission (at page 41).

3. It is stated in the brief that, without a Commission license, the task of protecting the Black River would be "far more difficult". (Brief, page 37). That suggestion, also, ignores the power of the Commission under Section 4 (g) to make an investigation upon its own motion and "to issue such order as it may find appropriate" to protect navigation and water resources.

There are several other suggestions in the brief similar to those we have mentioned—emphasizing the asserted desirability of what is referred to as "the Commission's continuing supervision" (Brief, page 20). All of such suggestions are foreign to the issues with which we are concerned here.

CONCLUSION.

The decision of the court below, setting aside the findings and order of the Commission as erroneous in law and unsupported by substantial evidence, should be affirmed.

Respectfully submitted,

ROBERT J. KEEFE,
ROBERT F. SCHLAFLY,
Counsel for Respondent,
Union Electric Company.

February, 1965.

APPENDIX A.

Pertinent Provisions of the Federal Power Act in Addition to Those Set Out in the Brief for the Commission.

Definitions.

Sec. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * * * * *

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

* * * * * * * *

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribu-

tion system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project;

* * * * * * * *

(49 Stat. 838-839, 16 U. S. C. 796.)

Reports.

Sec. 4. The Commission is hereby authorized and empowered——

* * * * * * * *

(d) To make public from time to time the information secured hereunder and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this Part, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof. Such report shall contain the names and show the compensation of the persons employed by the Commission.

* * * * * * * *

(49 Stat. 839-840, 16 U. S. C. 797.)

Conditions Incorporated in Licenses.

The Federal Power Act prescribes certain of the terms and conditions to be included in licenses for water power

projects and requirements relating to licensed projects. Among the conditions and requirements prescribed are the following:

1. That each license shall be limited to a period of fifty years—Section 6 of the Federal Power Act, 49 Stat. 841, 16 U. S. C. 799;

2. That each license shall be conditioned upon acceptance by the licensee of the terms and conditions of the Act and of such further conditions as the Commission shall prescribe in conformity with the Act, which terms and conditions and the acceptance thereof shall be expressed in the license—Section 6, 49 Stat. 841, 16 U. S. C. 799;

3. That a license may be altered or surrendered only upon mutual agreement between the licensee and the Commission—Section 6, 49 Stat. 841, 16 U. S. C. 799;

4. That after twenty years of operation, surplus earnings "in excess of a specified reasonable rate of return upon the net investment" of the licensee shall be maintained as a reserve which the Commission may order held until the end of the license period or applied in reduction of net investment—Section 10 (d), 49 Stat. 843, 16 U. S. C. 803 (d);

5. That the licensee shall pay a reasonable annual charge "in an amount to be fixed by the Commission" —Section 10 (e), 49 Stat. 843, 16 U. S. C. 803 (e);

6. That the United States may acquire the project upon or after the expiration of the license period upon payment of the net investment of the licensee not to exceed the fair value—that provision being subject to a *proviso* reserving the right of the United States or of any state or municipality to take over the project by condemnation upon payment of just

compensation—Section 14, 49 Stat. 844, 16 U. S. C. 807;

7. That the accounts and records of the licensee shall be kept in accordance with rules and regulations of the Commission—Section 301 (Part III of the Act), 49 Stat. 854, 16 U. S. C. 825;

8. That the Commission may fix rates of depreciation and may prescribe what charges are to be treated as depreciation charges—Section 302 (Part III), 49 Stat. 855, 16 U. S. C. 825a;

9. That the licensee shall file annual and other periodic and special reports—Section 304 (Part III), 49 Stat. 855, 16 U. S. C. 825c.

The statute also authorizes the Commission to require that additional conditions be incorporated in the license—Section 10 (g), 49 Stat. 844, 16 U. S. C. 803 (g).

APPENDIX B.

Excerpt from Senate Debate Relating to the Federal Water Power Act, Approved June 10, 1920 (41 Stat. 1063, 16 U. S. C. 791-823).

May 27, 1920, 59 Cong. Rec. 7730

Mr. King. This bill, as I interpret it, would make every stream navigable, even to the headwaters of the smallest stream, or up to the snow line, where the snow melts and finds its way by little trickles and rivulets into some other stream. For instance, this language, if the Senator will pardon me——

Mr. Nelson. Let me call the attention of the Senator to the first part of the amendment, which reads:

> "Navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States——

Mr. King. The Senator will see that that does not impose any limitation upon the Federal Government as to what it may regulate. When it confers the power to regulate commerce among the States, et cetera, that is not a definition of what commerce is or the extent to which Congress may control streams. The Supreme Court has held, as I understand, that tributaries of tributaries of other tributaries, if any part of such tributary of the final stream was navigable, would be under the cognizance of the Federal Government. That would carry up to the snow line.

Mr. Nelson. The court's decision only goes to this extent—and the facts in the case must be considered—that as to the tributaries that supply water to the main stream, which is in fact and in law navigable,

Congress of necessity must have sufficient jurisdiction over those feeders to prevent their being dammed up and thereby preventing the supply of water running into the main stream. That is the extent of the decision and the Senator ought to see that that is inevitable, for if all the feeders of our great rivers, such as the Mississippi, the Missouri, and other navigable rivers, could be dammed up so that water would be kept away from them they would cease to be navigable.

Mr. King. I am not arguing that question.

Mr. Nelson. So the Government has jurisdiction to the extent that the supply of water can not be cut off from a navigable stream.

Mr. King. Obviously, then, under the Senator's contention, the Federal Government would have jurisdiction over the snow line, and, as the Senator from Colorado (Mr. Thomas) sotto voce says, it would have jurisdiction of the clouds which produce the snow which melts and produces the spring which produces the tributary flowing into the river which is navigable. So that the Federal Government may stretch out its powerful and omnipotent hand until it can grasp the snow in the mountains and say, "We have jurisdiction over that."

Mr. Nelson. That is a forced construction.

Mr. King. I think that the Senator's position leads to that.

Mr. Nelson. It does not lead to that, and that is not my position. *The Senator a few moments ago referred to the Rio Grande case. The court intimated incidentally in that opinion that the control of Congress extended to the feeders of the stream, but when it comes to applying the principles of law to the facts in each case they must be measured by the facts. The court did not mean to decide that the feeders were navigable.*

What the court meant to say was that the Federal Government has sufficient jurisdiction over the feeders to see to it that the supply of water shall not be destroyed or so diminished in the feeders as to prevent the main stream from being navigable. The Senator on reflection ought to see that if the Government had no control whatever of the feeders—if such a thing were possible, although I can not conceive it—if it were possible for the States or individuals to dam up the feeders and prevent a drop of water flowing into the main navigable stream, they could dry up the main stream and destroy navigation on it. Except in those sections where the water is exhausted for irrigation, the erection of dams in feeders, as a matter of fact, for instance, in the East and in the Middle West, does not diminish the supply of water, for the water flows over the dam in one way or another and enters the feeders and then the main stream. It is only in the arid West where it is possible to divert water entirely for irrigation purposes from the main stream. (*Emphasis added.*)

To what extent can that be done? I take it that if a case of that kind should come before the court, the court would consider both the rights of the farmers, who needed the water for irrigation, *and the interests of commerce requiring water for navigation,* and the question would be one of fact in each case. Does the diversion of the water of a certain feeder of a certain stream for irrigation purposes diminish the quantity of the water to such an extent as to destroy the navigability of the main stream? *If the diversion of the water did not diminish the navigability of the main stream, the Government would have no control whatever. Furthermore, it would only have control to the extent of the supply of water needed to subserve the purposes of real navigation.* (*Emphasis added.*)

We are not seeking to interfere with the present situation, and no matter what we put into this bill, if the Senator from Maine will excuse me a moment longer, we can not change the decisions of the Supreme Court as to their determination of the words "navigable stream". We could not undo by this legislation, if we should make the effort, what they have decided. We have made no such attempt. We have simply said that those parts of streams or bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which in either their natural or improved conditions, and so forth, are navigable, shall be considered to be navigable streams. That is all we have said. We have simply left the matter where the courts have left it; and if we undertook to change the law as it is and to say that a certain class of streams which are navigable in fact are not navigable the Supreme Court would overrule us.

APPENDIX C.

Excerpts from statements by members of the Federal Power Commission and by the Solicitor for the Commission at hearings before the House Committee on Interstate and Foreign Commerce, and from a memorandum of the Commission presented to that Committee, while it was considering the 1935 amendments to the Federal Water Power Act, incorporated in Title II of the Public Utility Act of 1935 (H. R. 5423).

(Reported in "Hearings before The Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, First Session, on H. R. 5423"—Volume 1, Part 1.)

Thursday, March 7, 1935

House of Representatives,
Committee on Interstate and Foreign Commerce,
Washington, D. C.

The committee met, pursuant to adjournment, at 10 a. m., Hon. Sam Rayburn (chairman), presiding.

Statement of Commissioner Frank R. McNinch, Chairman Federal Power Commission

The Chairman. All right, Mr. McNinch. I think that the hearing today is specifically on title II of the bill. The representatives of the Power Commission are here.

Commissioner McNinch. Mr. Chairman and gentlemen of the committee, the Federal Power Commission does feel a special degree of interest in title II of the bill under consideration because it so directly affects the functions and the jurisdiction of the Commission.

The amendments to the Federal Water Power Act begin on page 77 of the bill and the first part or title

of these amendments has to do with the textual amendment for the purpose, primarily, of the clarification of the act as we now have it.

These amendments are suggested out of the experience of the Commission in its administration of the Federal Water Power Act and because of the character of these amendments, being as I have said, primarily for the purpose of clarifying the act at various places, it is thought that you may not want any extended discussion of those particular amendments; but we shall be very glad at any later time if the committee has difficulty about any one or more of those amendments to give you our views of the reasons for the necessity for such amendments.

* * * * * * * *

(Vol. 1, Part 1, p. 383.)

* * * * * * * *

Statement of Commissioner Clyde L. Seavey, of The Federal Power Commission

Commissioner Seavey. Mr. Chairman and members of the committee, in connection with what Chairman McNinch has stated regarding the bill, I might call attention to the fact that there has been prepared an analysis of the amendments proposed to the water power bill as it now exists, and also the new amendments and those amendments are in the form of two memoranda which I believe have been distributed to the members of this committee; or, at least, they are made available.

I would like to ask at this time too if it is permissible that those might be filed with the committee as a part of the testimony at this time?

The Chairman. Yes.

* * * * * * * *

(The documents referred to are as follows:)

(Vol. 1, Part 1, p. 384.)

* * * * * * * *

Amendments to Present Sections of Water Power Act
(Rayburn bill, H. R. 5423, pp. 77 to 102)

* * * * * * * *

(Vol. 1, Part 1, p. 388.)

* * * * * * * *

Section 210 of the bill amends section 23 of the Water Power Act. * * * In subsection (b) the present provision that those intending to undertake projects on a nonnavigable tributary of a navigable stream may in their discretion file declaration of such intention with the Commission is changed so as to make it a duty to file such a declaration before proceeding with the construction, maintenance or operation of any project on such waters. Furthermore, a provision is inserted expressly making it unlawful to construct a project on any navigable waters without a license granted pursuant to the act. This latter provision is in substance the result achieved by the River and Harbor Act of 1899 when read with the Water Power Act. It is thought desirable to bring together the regulations dealing with power projects in a single act. *Under this section as amended, every person intending to construct a project which might conceivably affect any navigable waters would be under the duty of coming to the Commission. The act would be greatly strengthened by enabling the Commission to preserve control over all projects with which the Federal Government has any valid concern.*

* * * * * * * *

(Vol. 1, Part 1, p. 391—*emphasis added.*)

Excerpts from Statement of Dozier DeVane, Solicitor, Federal Power Commission (Vol. 1, Part 1, p. 449, at pp. 471-472, 474, 476, 488-490).

(Saturday, March 9, 1935)

* * * * * * * *

Mr. Martin. Although it may be rather in the form of repetition, the memorandum impresses me that the contention of Mr. Mapes in section 3 is broader, from the standpoint of commerce in the way of a power, than the language in section 4.

It occurred to me that you could just leave those words "navigable waters in the United States" in the section and then add as defined in section 3.

Mr. DeVane. No, sir; what we are attempting to do is to make it clear that the Commission has the authority to issue license under section 4 in cases that arise under section 23 of the act.

Mr. Martin. The addition of the words defined in section 3, added to "navigable waters of the United States", however, would incorporate the section 3 definition of navigable waters.

Mr. DeVane. Of course, we think it exists without that amendment.

Mr. Ryan calls my attention to the fact that section 3 might be considered to apply only to navigable waters, while section 23 applies to nonnavigable waters as well.

The jurisdiction of Congress extends beyond the navigable waters. *It extends to nonnavigable waters where anything you do in those rivers or streams might affect navigation and those are the cases which fall under section 23 of the act.*

Mr. Crosser. What was that last statement? I did not quite hear it.

Mr. DeVane. *Section 23 applies to nonnavigable waters, where anything that is done in those waters might affect interstate or foreign commerce.*

The Chairman. I think the committee has your position on that. You may pass on.

* * * * * * *

(Vol. 1, Part 1, pp. 471-472—*emphasis added.*)

* * * * * * *

Mr. Mapes. Does the Commission arrive at its conclusion, reach about the same conclusion, as to whether a plant should obtain the license or not, as Congress and the Board of Engineers do when they determine that a stream is navigable and that, therefore, people who desire to build a bridge across it, must get the consent of Congress to do it?

Mr. DeVane. The Commission in the first instance refers these declarations of intention to the War Department, the Engineer Corps of the War Department, and an investigation and recommendation is made by that Department, with reference to the effect upon interstate or foreign commerce, and the Commission, if it is necessary after that investigation and report is made, holds hearings, takes evidence, and makes its findings.

The Commission attempts to act according to the facts as they are shown. In very few of the cases is there ever any controversy.

Mr. Mapes. *Are these two expressions synonymous, or not; the effect upon interstate commerce, and the navigability of a stream?*

Mr. DeVane. *Mr. Mapes, I think they are. Do you want to hear argument on the other side as to whether they are or not?*

Mr. Mapes. *No.*

Mr. DeVane. I see that you have some knowledge at least of the fact that that question has been debated, but to me it is a question of "tweedledee and tweedledum." I cannot take my legal processes to that refinement. There may be a difference; yes, sir. It is conceivable, at least in somebody's mind, that the construction of a project in a certain stream will not at the time in fact have any effect upon interstate or foreign commerce, but that the construction of the project has a potential possibility of affecting interstate or foreign commerce at some future time which will prevent a man from spending money to put commerce on that stream.

Now that is the way the argument runs.

* * * * * * * *

(Vol. 1, Part 1, p. 474—*emphasis added.*)

* * * * * * * *

Mr. DeVane. We are not seeking by any amendment that we propose to enlarge the jurisdiction of the Commission in the waters of the United States over which Congress has control.

Mr. Holmes. I understood you to say you were, so that you could control other than navigable waters.

Mr. DeVane. That is the law today.

Mr. Holmes. Then I misunderstood you in that regard.

Mr. DeVane. Well, I would like to make that perfectly clear.

We are not extending the power. We are not proposing any amendment that extends the power of the Commission over any waters of the United States that they do not have power over today—not at all.

* * * * * * * *

(Vol. 1, Part 1, p. 476.)

(Tuesday, March 12, 1935)

* * * * * * *

Mr. DeVane. Page 99 of the bill.

* * * * * * *

At this point, Mr. Mapes, I think we might clear up the difficulty that I had in answering a question that you asked me on Saturday.

You will observe that under subsection (b) of section 23, persons desiring to construct projects in waters over which Congress has jurisdiction, but which may not be looked upon as navigable waters, as such, may come to the Commission under a declaration of intention and have determined in advance of the construction whether or not a license is necessary.

That provision in section 23 is broader than the language in section 3, where the definition of navigable waters is used, the one that you were asking me about, on Saturday.

The definition of navigable waters in section 3 applies only to those waters that are in fact navigable.

Section 23 applies to waters that are not in fact navigable, *but where construction may affect interstate or foreign commerce.*

* * * * * * *

(Vol. 1, Part 1, pp. 488-489—*emphasis added.*)

* * * * * * *

Mr. Mapes. Yes. Has the court sustained the Commission in that respect, the jurisdiction of the Commission?

Mr. DeVane. *Of nonnavigable waters?*

Mr. Mapes. *Yes.*

Mr. DeVane. *You are asking about the jurisdiction of Congress over these nonnavigable waters, that affect navigation?*

Mr. Mapes. *Yes.*

Mr. DeVane. *Yes; the jurisdiction of Congress over such streams was upheld in the case of the United States v. Rio Grande Dam & Irrigation Co., 174 U. S. 690. That was decided under the Rivers and Harbors Act of 1899, which in effect is the same as section 23 of this act.*

* * * * * * * * *

(Vol. 1, Part 1, p. 490—*emphasis added.*)

APPENDIX D.

Excerpts from Reports of Senate and House Committees relating to Title II of Public Utility Act of 1935, approved August 26, 1935 (49 Stat. 838, *et seq.*, 16 U. S. C. 791a, *et seq.*), amending the Federal Water Power Act, making it Part I thereof, and enacting Parts II and III as additions thereto.

Report of the Senate Committee on Interstate Commerce, to accompany S. 2796, S. Rep. 621, 74th Cong., 1st Sess., pp. 46-47 (May 13, 1935)

* * * * * * *

Section 210

* * * * * * *

This section also amends the second paragraph of section 23, dealing with the filing of declarations of intention, and makes this paragraph subsection (b) of the section. Under the present provision anyone intending to undertake a project on a nonnavigable tributary of a navigable stream may in his discretion file such a declaration with the Commission. If the Commission finds that the interests of interstate commerce would be affected by the project, it is made unlawful to proceed without having secured a license. This provision is changed to make the filing of a declaration of intention mandatory in such cases. Furthermore, a provision is inserted expressly making it unlawful to construct a project on any navigable waters without a license granted pursuant to the act. This latter provision is in substance the effect of the River and Harbor Act of 1899 when read with the Water Power Act. It is thought desirable to bring together in a single act the positive requirements regarding the construction of water-power projects.

Under this subsection with the two amendments here made every person intending to construct a project which might conceivably affect any navigable waters would be under the duty of coming to the Commission. The act would be greatly strengthened by enabling the Commission to preserve control over all projects with which the Federal Government has any valid concern. *(Emphasis added.)*

Report of the House Committee on Interstate and Foreign Commerce, to accompany S. 2796, H. Rep. 1318, 74th Cong., 1st Sess., pp. 25-26 (June 24, 1935)

* * * * * * * *

Section 210

Section 23 is amended to make the same change in the provision for the determination of the value of a project constructed prior to the adoption of the act and voluntarily brought under license that is introduced in section 14 by section 207 of the bill. * * * The second paragraph of section 23, here lettered subsection (b), is also amended by expressly making unlawful the construction of any dam, water conduit, reservoir, or power house in any of the navigable waters of the United States, or upon any of the public lands or reservations in the United States, except pursuant to a permit granted prior to June 10, 1920, or a license granted pursuant to the act.

This provision is in substance the present result under the River and Harbor Act of 1899 and the Water Power Act. Furthermore, the provision making discretionary the filing of applications for preliminary permits for the construction of projects in the nonnavigable tributaries of navigable streams is changed to make such applications mandatory. *In this way, every person intending to construct a project*

which might affect navigation would be required to come to the Commission for a determination of the interests of the United States. **This would greatly strengthen the act by enabling the Commission to maintain control over all projects with which the Federal Government has any valid concern.** ***(Emphasis added.)***

• • • • • • • •

APPENDIX E.

Excerpts from Forty-second Annual Report of the Federal Power Commission for the fiscal year ended June 30, 1962.

(Pages 12-13)

Legislative Recommendations

The Commission during the past year has made an extensive review of its existing statutory authority under the Federal Power Act and the Natural Gas Act. In the light of that review and experience gained during this period, we have drafted a legislative program designed to enable us to carry out more effectively the policies which the Congress has entrusted to this Commission.

Fifteen specific recommendations are being made to the Congress and the President, two of which are included in our proposed legislative program for the first time. • • •

New Recommendations

The two new recommendations included for the first time this year are:

• • • • • • • •

2. *Licensing of steam-electric plant facilities on navigable waters.*—Amend the Federal Power Act to provide for Commission licensing of new facilities to be erected in or abutting the navigable waters of the United States for the diversion of water for use in a steam-electric generating plant.

At present the Commission's licensing jurisdiction under Part I of the Federal Power Act is limited to projects for the generation of hydroelectric power.

But increasingly in recent years plants for steam-electric generation have been built adjacent to navigable waters of the United States with diversion facilities in, across or along the stream to provide water for cooling purposes. * * *

(F. P. C. Forty-second Annual Report for 1962, pp. 12-13.)

(Pages 23-24)

New Regulatory Policies

Clearly defined policies, to serve as guideposts in the everyday decisional processes, are fundamental to the effective operations of both the regulator and the regulated. During the fiscal year 1962, the Commission issued several landmark decisions to clarify the scope of its jurisdiction in electric power and natural gas.

* * * * * * * *

Among the more important opinions and other actions establishing "firsts" in policy during the 1962 fiscal year were:

Hydroelectric projects constructed on nonnavigable waters.—In Opinion No. 356, issued April 19, 1962, the Commission ruled for the first time that hydroelectric project to be constructed in and to utilize nonnavigable waters for the purpose of developing power for interstate use affects the interests of interstate commerce and cannot be constructed without an FPC license. The Commission adopted the findings of one of its presiding examiners that Union Electric Co.'s Taum Sauk pumped storage hydroelectric project on the East Fork of the Black River in Reynolds County, Mo., was subject to FPC licensing authority not only because it would affect downstream navi-

gability of the river but also because it would affect the interests of interstate commerce since the power would be used to supply markets in Missouri and Illinois.

Past Commission findings with respect to hydroelectric projects not affecting Government lands or dams have been limited to determinations of whether the projects occupied navigable waters of the United States or affected their navigable capacity. The Commission in Opinion 356 held that the issue of whether a project developing interstate power constituted an effect on the interests of interstate commerce within the meaning of section 23 (b) of the Federal Power Act and required licensing could no longer go unresolved because in the years ahead the United States will become overwhelmingly more dependent upon the maximum development of its water resources in all their uses.

(F. P. C. Forty-second Annual Report for 1962, pp. 23-24.)